69

No. (1)

Supreme Court, U.S.
FILED
07-482 OCT 9 - 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE STATE OF TEXAS,

Petitioner,

v.

GERALDINE H. SOILEAU,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES A. ROSENTHAL, JR.
Harris County District Attorney

JAMES L. NORRIS*
KATHLEEN A.B. BRADDOCK
Assistant District Attorneys
Harris County, Texas

1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5824
**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether the Fifth Circuit Court decision in the present case and the Fifth Circuit Court decision in *Hickman (In re Hickman) v. Texas*, 260 F.3d 400 (5th Cir. 2001) allowing a commercial bondsman in bankruptcy to discharge criminal bond forfeiture judgments are in direct conflict with the Third Circuit Court decision in *Dobrek v. Phelan*, 419 F.3d 259 (3d Cir. 2005) which held that a commercial bondsman's criminal bond forfeiture judgments are not dischargeable in bankruptcy.

Whether the U.S. Supreme Court decisions in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) and *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) prevents the State of Texas from asserting sovereign immunity when a bankruptcy court's *in rem* jurisdiction offends traditional state sovereignty over a state's criminal justice system.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS AND ORDERS 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF FACTS 3

ARGUMENT 4

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE FIFTH CIRCUIT COURT OPINION AND THE THIRD CIRCUIT COURT OPINION ON WHETHER BOND FORFEITURE JUDGMENTS ARE DISCHARGEABLE IN BANKRUPTCY 4

II. THE DECISIONS IN *KATZ* AND *HOOD* DO NOT PREVENT THE STATE FROM ASSERTING ITS SOVEREIGNTY WHEN A BANKRUPTCY COURT'S *IN REM* JURISDICTION OFFENDS TRADITIONAL STATE SOVEREIGNTY OVER ITS CRIMINAL JUSTICE SYSTEM 10

CONCLUSION 21

TABLE OF CONTENTS – Continued

Page

APPENDIX

State of Texas v. Geraldine H. Soileau, 488 F.3d 302 (5th Cir. 2007), dated May 22, 2007..... App. 01

Memorandum and Order of the Federal District Court, Southern District of Texas Houston Division, dated June 3, 2005 ..... App. 30

Memorandum Opinion and Order of the Bankruptcy Court for the Southern District of Texas, Houston Division, dated August 18, 2004..... App. 33

Order from the Fifth Circuit Court denying the State's Petition for Rehearing En Banc dated August 8, 2007..... App. 38

TABLE OF AUTHORITIES

Page

CASES

Aber v. Warden, 49 Tex. 377 (1878) 10

Bailout Bonding Co. v. State, 797 S.W.2d 275 (Tex. App. 1990) 11

Bean (In re Bean) v. Colorado, 72 B.R. 503 (D. Colo. 1987) 11, 12

Central Pines Land Co. v. United States, 274 F.3d 881 (5th Cir. 2001) 6, 7

Central Virginia Community College v. Katz, 546 U.S. 356 (2006) ..... *passim*

Dobrek v. Phelan, 419 F.3d 259 (3d Cir. 2005).... *passim*

Ex Parte Burr, 185 S.W.3d 451 (Tex.Crim.App. 2006) 11

First Capital Interest, L.L.C. v. C.L. Garland, 98 Fed.Appx. 1000 (5th Cir. 2004) 7

Fly v. State, 550 S.W.2d 684 (Tex.Crim.App. 1977) 18

Gay v. State, 20 Tex. 504 (1857) 10

General Bonding & Casualty Ins. Co. v. State, 73 Tex.Crim. 649, 165 S.W. 615 (1914) 8

Gibson v. State, 401 S.W.2d 822 (Tex.Crim.App. 1967) 17

Hickman (In re Hickman) v. Texas, 260 F.3d 400 (5th Cir. 2001) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Jeter v. State, 86 Tex. 555, 26 S.W. 49 (Tex. 1894)..... 10, 11

Kelly v. Robinson, 479 U.S. 36 (1986)..... 13, 15, 16, 20

Scott (In re Scott) v. Alabama, 106 B.R. 698 (Bankr.S.D. Ala. 1989)..... 11, 12

State ex rel. Vance v. Routt, 571 S.W.2d 903 (Tex.Crim.App. 1978)..... 11

State v. Sellers, 790 S.W.2d 316 (Tex.Crim.App. 1990)..... 11

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) ..... *passim*

United States v. Kirk, 528 F.2d 1057 (5th Cir. 1976)..... 7

Williams v. State, 707 S.W.2d 40 (Tex.Crim.App. 1986)..... 11

STATUTES

11 U.S.C. § 523(a)(7) ..... *passim*

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 1291 1

28 U.S.C. § 158(a)(1) 1

28 U.S.C. § 158(d)..... 1

TEX. CODE CRIM. PROC. ART. 22.13(a)(5) 19

OPINIONS AND ORDERS

On August 18, 2004, the Bankruptcy Court for the Southern District of Texas filed a Memorandum Opinion and Order denying the State of Texas' ("the State") Motion to Dismiss Based on Sovereign Immunity, see App. p. 33. The State appealed the Bankruptcy Court's denial of its Motion to the Federal District Court for the Southern District of Texas, Houston Division. The Federal District Court entered a Memorandum and Order on June 3, 2005 affirming the Bankruptcy Court's Memorandum Opinion and Order, see App. p. 30. The State appealed the Federal District Court's Order affirming the Bankruptcy Court's Memorandum Opinion and Order to the Fifth Circuit Court of Appeals. The Fifth Circuit Court affirmed the decision of the Federal District Court, see App. p. 1. On August 8, 2007, the Fifth Circuit Court denied the State's Petition for Rehearing *En Banc*, see App. p. 38.

JURISDICTION

The U.S. Supreme Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Fifth Circuit Court's decision on a writ of certiorari. The Fifth Circuit Court had jurisdiction to consider an appeal from a decision of the Federal District Court dated June 3, 2005, pursuant to 28 U.S.C. § 158(d) and 28 U.S.C. § 1291. The Federal District Court had jurisdiction to consider the appeal from a final Bankruptcy Court Order dated August 18, 2004, pursuant to 28 U.S.C. § 158(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XI

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

11 U.S.C. § 523(a)(7)

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

. . . .

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty –

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

. . . .

STATEMENT OF FACTS

The facts in this case are undisputed. Geraldine Soileau ("Soileau"), a licensed bail bondsman in Harris County, Texas, filed a Chapter 7 Bankruptcy on April 27, 2004. On Soileau's Bankruptcy Petition, Schedule F, she listed fifty-five criminal bail bond forfeiture judgments due and owing to the State in the amount of $650,897.71 that she wanted discharged in her bankruptcy. On May 12, 2004, the State filed a Motion For Dismissal Based on Sovereign Immunity to prevent the bankruptcy court from having jurisdiction to discharge Soileau's fifty-five criminal bond forfeiture judgments. On June 29, 2004, the State's Motion was set for oral arguments. At this hearing, the Bankruptcy Court allowed the State to brief the effect of *Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440 (2004) that had just been decided on May 17, 2004. On July 2, 2004, the State filed its brief concerning the effect of the *Hood* decision. On August 18, 2004, the Bankruptcy Court filed a Memorandum Opinion and Order denying the State's Motion to Dismiss. The State then filed a notice of appeal to the Federal District Court on August 25, 2004. The Federal District Court entered a Memorandum and Order on June 3, 2005 affirming the Bankruptcy Court's denial of the State's Motion to Dismiss Based on Sovereign Immunity. The State then filed a notice of appeal to the Fifth Circuit Court of Appeals on June 17, 2005. Approximately seven months later, on January 23, 2006, this Court decided *Central Virginia Community College v. Katz*,

546 U.S. 356 (2006). On February 2, 2006, the Fifth Circuit Court asked the parties to file a letter brief with the Court stating what effect the *Katz* decision had on the appeal. On February 16, 2006, the State filed its letter brief with the Court. The Fifth Circuit Court affirmed the Federal District Court on May 22, 2007. The State filed a Petition for Rehearing *En Banc* before the Fifth Circuit Court on June 1, 2007. The Fifth Circuit Court denied the State's Petition for Rehearing *En Banc* on August 8, 2007.

ARGUMENT

I

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE FIFTH CIRCUIT COURT OPINION AND THE THIRD CIRCUIT COURT OPINION ON WHETHER BOND FORFEITURE JUDGMENTS ARE DISCHARGEABLE IN BANKRUPTCY.

The Fifth Circuit Court in *Hickman (In re Hickman) v. Texas*, 260 F.3d 400 (5th Cir. 2001) holds that bond forfeiture judgments of a commercial bondsman are dischargeable in bankruptcy because, according to the *Hickman* court, § 523(a)(7) of the Bankruptcy Code excludes only those forfeitures imposed due to the misconduct or wrongdoing of the debtor. In *Hickman*, the court held that there was no misconduct by the commercial bondsman (Hickman). *Hickman*, 260 F.3d at 405-406, also states that the bail bond debt of

a commercial surety is not encompassed within § 523(a)(7) since the "true nature" of bail bond debt is contractual, not penal. The Fifth Circuit in the present case held that bond forfeiture debt of a commercial bondsman is dischargeable in bankruptcy and that the State is not entitled to claim sovereign immunity. In the present case, the Fifth Circuit refused to overrule *Hickman*.

The Third Circuit Court in *Dobrek v. Phelan*, 419 F.3d 259 (3d Cir. 2005) holds that bond forfeiture judgments are not dischargeable in bankruptcy because the plain meaning of forfeiture contained in § 523(a)(7) of the Bankruptcy Code includes bond forfeiture judgments. *Dobrek*, 419 F.3d at 267, expressly did not adopt the *Hickman* holding. *Dobrek* disagreed when *Hickman* held that bail bond debt of a commercial surety is not encompassed within § 523(a)(7) and when *Hickman* stated that the "true nature" of a commercial surety's bail bond debt is contractual, not penal. Rather *Dobrek* held that bond forfeiture judgments are forfeitures within the meaning of § 523(a)(7) and that bond forfeiture judgments are not dischargeable in bankruptcy. As a result of the opinions in *Hickman* and *Dobrek*, there is a conflict between the circuit courts on the correct treatment that bond forfeiture judgments should receive in bankruptcy. The U.S. Supreme Court's Rule 10(a) provides this Court with judicial discretion to consider a conflict between the Circuit Courts of Appeals. The State submits that the correct treatment to be afforded bond forfeiture judgments in the

bankruptcy court is an important matter confronting all states. Accordingly, this conflict is an important federal question that should be resolved by this Court in granting the State's request for certiorari.

In the present case, the Fifth Circuit majority opinion repeatedly references that the State challenged the bankruptcy court's jurisdiction under sovereign immunity grounds; rather than the State expressly challenging the Fifth Circuit's holding in *Hickman* which stated that bond forfeiture judgments are dischargeable in bankruptcy and are not encompassed by § 523(a)(7) of the Bankruptcy Code. App. p. 15, footnote 36. However the State, both in its appeal brief and at oral arguments, contended that *Hickman* was wrongly decided. The Fifth Circuit acknowledged that the State contended that *Dobrek* correctly decided that bond forfeiture judgments are **not dischargeable** in bankruptcy. The reason the State did not directly challenge the *Hickman* decision before the Bankruptcy Court was because the State was prevented from doing so by the Fifth Circuit Court rule set forth in *Central Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001), which states:

> It is well-established in this circuit that one panel of the Court may not overrule another (Citation omitted). While easily confused with traditional *stare decisis*, "our rule that one panel cannot overturn another serves a somewhat different purpose of institutional orderliness." (Citation omitted). This Court

> stated in *United States v. Kirk*, 528 F.2d 1057 (5th Cir. 1976) that "[i]t is the practice of this Circuit for three-judge panels to abide by a prior Fifth Circuit decision until the decision is overruled, expressly or implicitly, by either the United States Supreme Court or by the Fifth Circuit sitting en banc."

It was this Fifth Circuit Court rule in *Central Pines Land Co.* that prevented the State from directly challenging *Hickman* since one panel of the Fifth Circuit cannot overrule a former panel decision of the Fifth Circuit. This is borne out by the decision in *First Capital Interest, L.L.C. v. C.L. Garland*, 98 Fed.Appx. 1000 (5th Cir. 2004) where there was a direct challenge to *Hickman* and the Fifth Circuit stated, "Absent circumstances not present here, one panel of this court cannot overrule another." (Citation omitted). The State was a party in *First Capital Interest, L.L.C. v. C.L. Garland* up through the time that the bankruptcy court, recognizing the authority of the Fifth Circuit, upheld *Hickman*. The State realized in the present case that it had to find an alternative basis to challenge the discharge of bond forfeiture debt in the bankruptcy court. The State concluded that a challenge on the basis of sovereign immunity should prevail; thus the State presented a sovereign immunity challenge to the bankruptcy court's jurisdiction, even though the State continued to assert that *Hickman* was wrongly decided. In the present case, the State made a request to the Fifth Circuit to overrule *Hickman* in a motion for reconsideration *en banc* and the State's motion was denied. As

a result, the State is required to turn to this Court to either (1) overrule *Hickman* or (2) agree that the State is entitled to sovereign immunity in the bankruptcy court or both. This is necessary in order to prevent the bankruptcy court from discharging the fifty-five criminal bond forfeiture judgments of Soileau.

Chief Judge Edith H. Jones of the Fifth Circuit Court filed a special concurring opinion in the present case wherein she states: "The State has consistently argued, however, and I agree that *Hickman* was wrongly decided." App. p. 24. This concurring opinion goes on to set forth that § 523(a)(7) of the Bankruptcy Code renders Soileau's bond forfeiture judgments nondischargeable and that the better approach was set out in *Dobrek*, which held that § 523(a)(7) provides that commercial bail bond forfeiture judgments are nondischargeable in bankruptcy. App. p. 24.

The *Hickman* court, 260 F.3d at 406, was of the opinion that " . . . under the present structure of the Texas bail bond system the role of the surety is essentially contractual." The *Hickman* court is mistaken as to Texas law. The Texas Court of Criminal Appeals stated as early as 1914 in *General Bonding & Casualty Ins. Co. v. State*, 73 Tex.Crim. 649, 165 S.W. 615, 617 (1914) that in a bond forfeiture action, "Though the action is not directly to punish the offender, yet it partakes of punishment for an offense against the state, and is **not in the nature of a contract**." (Emphasis added). Furthermore as Chief Judge Jones' concurring opinion in the present case states,

"As *Dobrek* correctly points out, regardless whether bail bonds are contractual in nature, there is no basis for *Hickman's* holding that § 523(a)(7) 'is restricted in scope to exempt from dischargeability only obligations of a [purely] penal nature,' as 'forfeitures' are included in § 523(a)(7) without respect to their nature." App. pp. 24-25.

The State submits that the Third Circuit holding in *Dobrek* is correct in concluding that commercial bail bond forfeitures are nondischargeable within the plain meaning of § 523(a)(7). As set forth above, the concurring opinion in the present case stated that *Hickman* was wrongly decided and even urged the Fifth Circuit Court to rehear this case *en banc* and to overturn *Hickman*. App. p. 24. However the Fifth Circuit has failed to overturn *Hickman*. As a result, the State now turns to this Court and is requesting this Court to grant certiorari and to overturn *Hickman*.

The State requests that this Court resolve the conflict between the Fifth Circuit and the Third Circuit by holding that commercial bail bond forfeiture judgments are nondischargeable within the plain meaning of § 523(a)(7) of the Bankruptcy Code.

II

THE DECISIONS IN *KATZ* AND *HOOD* DO NOT PREVENT THE STATE FROM ASSERTING ITS SOVEREIGNTY WHEN A BANKRUPTCY COURT'S *IN REM* JURISDICTION OFFENDS TRADITIONAL STATE SOVEREIGNTY OVER ITS CRIMINAL JUSTICE SYSTEM.

The Fifth Circuit Court majority opinion in the present case, App. p. 9, holds that "Applying *Hood* and *Katz* to the instant case, we conclude that the State here has no claim to sovereign immunity." This holding by the Fifth Circuit places the integrity and self-sufficiency of the State's criminal justice system in jeopardy thereby requiring the State to file this Petition for Certiorari in order to determine whether the bankruptcy court should be allowed to interfere with the State's criminal justice system.

In Texas, bond forfeiture judgments are criminal in nature. In *Gay v. State*, 20 Tex. 504 (1857), the Texas Supreme Court classified bond forfeitures as criminal matters and again in *Aber v. Warden*, 49 Tex. 377 (1878), the Texas Supreme Court held that, "The enforcement of such bonds [forfeited bail-bond cases] was regarded as incidental to the criminal case in which they are given, and our opinion is, that the question present in this case is too closely connected with the judgment on the bail bond to be separable from it." In *Jeter v. State*, 86 Tex. 555, 26 S.W. 49 (Tex. 1894), the Texas Supreme Court held that a bond forfeiture case is "a criminal case, within the meaning of the constitution and laws of the state."

The *Jeter* court further stated that it did not have jurisdiction over bond forfeiture cases because "a proceeding for the forfeiture of a bail bond **is a criminal case**." (Emphasis added). Jurisdiction was found instead to vest in the highest Texas criminal court, the Texas Court of Criminal Appeals. In *Williams v. State*, 707 S.W.2d 40, 42 (Tex.Crim.App. 1986) the highest Texas Criminal Court stated, "Prior decisions of this Court and the Supreme Court leave no doubt that a bond forfeiture proceeding is 'criminal in nature.'" These early cases holding that bond forfeiture cases are criminal cases remain the law in Texas today. The following more recent cases have repeatedly reaffirmed that bond forfeiture cases are criminal: *Ex Parte Burr*, 185 S.W.3d 451, 452-453 (Tex.Crim.App. 2006); *Bailout Bonding Co. v. State*, 797 S.W.2d 275, 277 (Tex. App. 1990); *State v. Sellers*, 790 S.W.2d 316, 321 (Tex.Crim.App. 1990); and *State ex rel. Vance v. Routt*, 571 S.W.2d 903, 906 (Tex.Crim.App. 1978). Likewise in the present case, Chief Judge Jones' concurring opinion also acknowledges that bond forfeiture proceedings are criminal in nature. App. pp. 25-26.

Bankruptcy courts in other states have also held that bond forfeiture cases are criminal matters. The court in *Bean (In re Bean) v. Colorado*, 72 B.R. 503, 505 (D. Colo. 1987), interpreting other sections of the bankruptcy code, stated that "Few proceedings could possibly occupy a more central role in the operation of the state's traditional police power than the enforcement of criminal bail proceedings as part of a criminal prosecution." See also, *Scott (In re Scott) v.*

Alabama, 106 B.R. 698, 700 (Bankr.S.D. Ala. 1989) wherein the court, also interpreting other sections of the bankruptcy code, cited to *Bean* stating "the overriding objective of the State in executing on the judgment is to promote the crucial public welfare goal of preserving the integrity of the State's bail system." Furthermore the court in *Hickman*, 260 F.3d at 406, even acknowledged the State's position that allowing bond forfeiture judgments to be discharged in bankruptcy would undermine the effective administration of the State's criminal justice system. The *Hickman* court also cited to *Bean* and *Scott* as courts who were persuaded that the state's bail system effects its criminal justice system. Yet the *Hickman* court failed to adopt this reasoning and instead chose to discharge a surety's bond forfeiture judgments. Such contradictions in reasoning and the *Hickman* holding should not be allowed to stand.

The Fifth Circuit majority opinion in the present case again fails to recognize the significance of bond forfeiture judgments impacting the State's criminal justice system. This failure by the majority is even contrary to its own prior language in *Hickman*, 260 F.3d at 406 wherein the court recognized that in Texas " . . . the bail bond is an integral and essential tool in the administration of the State's criminal justice system." Still the majority, App. p. 9, states in the present case that in considering the holdings of *Katz* and *Hood*, together " . . . in no way infringes the sovereignty of a state as a creditor." This decision by

the majority is contrary to *Katz*, *Hood*, *Kelly v. Robinson*, 479 U.S. 36 (1986) and *Dobrek*.

The U.S. Supreme Court in *Hood*, 541 U.S. at 451, footnote 5, states:

> This is not to say, "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity," *United States v. Nordic Village, Inc.* 503 U.S. 30, 38, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992), as Justice THOMAS characterizes our opinion, *post*, at 1919, but rather that the court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State. Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State. No such concerns are present here, and we do not address them.

The present case does not involve a student loan debt. Rather the present case involves bond forfeiture judgments and these judgments are integral and essential tools in the administration of the State's criminal justice system. If a criminal defendant is able to post bond and for a fee obtain his release from custody and then later fails to report to court as ordered, the surety who made a profit on the release of the defendant from custody is never held fiscally responsible to the criminal justice system. This lack of a surety being held fiscally responsible is a direct result of the surety's debt to the State being discharged in bankruptcy. By such discharge, the surety

is then able to avoid his or her duty to relocate and to facilitate the incarceration of the defendant. Further such discharge allows the surety to simply pocket the money that the defendant paid the surety for the bond in the first place. Thus a bankruptcy court filing by a surety becomes a "get out of jail for a fee" card for the defendant and a profit center for the surety absent compliance with his or her bonding obligations. Such action clearly undermines the State's criminal justice system. Allowing the bankruptcy court to discharge these bond forfeiture judgments interferes with the State's right to administer its criminal justice system.

Chief Judge Jones' concurring opinion in the present case, App. p. 23, footnote 48, cites to *Hood*, footnote 5, in recognizing that there are still areas of traditional state sovereignty into which bankruptcy courts cannot tread. The State submits that *Hood*, at footnote 5, provides the State with authority to claim sovereign immunity in the present case.

The Court in *Katz*, 546 U.S. at 359, was considering " . . . whether a proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies is barred by sovereign immunity." The *Katz* Court states, in part:

> . . . that States agreed in the plan of the convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to "Laws on the subject of Bankruptcies." (Citations omitted) . . . The scope of this consent was limited; the

> jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*-a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction. . . . In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts. *Id.* at 377-378.

This decision in *Katz* does not set forth, nor does it define, what proceedings are necessary to effectuate *in rem* jurisdiction in the bankruptcy court; future cases will need to determine the basis for such proceedings. Based on *Katz*, the State submits that *in rem* jurisdiction of the bankruptcy court does not encompass the present case since bond forfeiture judgments are fundamentally different from the proceedings in *Katz* regarding preferential transfers. Rather the present case involves fifty-five criminal bail bond forfeiture judgments against Soileau. Bond forfeiture proceedings are criminal matters; and as such, bond forfeiture proceedings are an integral and essential tool in the administration of the State's criminal justice system and should not be considered as part of the *in rem* jurisdiction of the bankruptcy court.

The Court in *Kelly*, 479 U.S. at 53 held that restitution obligations that are a condition of probation are nondischargeable under 11 U.S.C. § 523(a)(7). *Kelly*, 479 U.S. at 49 states that:

> This Court has recognized that the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief. *See Younger v. Harris*, *supra*, 401 U.S., at 44-45, 91 S.Ct. at 750-751. This reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case.

In addition, the concurring opinion in the present case, App. p. 25, states "Moreover, state criminal proceedings are not the 'usual case' in bankruptcy, and the Supreme Court has refused to allow bankruptcy jurisdiction to interfere with this traditional realm of state authority." This concurring opinion further states, "Neither *Hood* nor *Katz* conflicts with *Kelly*, whose authoritativeness we inferior courts must recognize."

The Third Circuit Court in *Dobrek*, 419 F.3d at 266-267 also applied *Kelly* to a bond forfeiture case stating that bond forfeiture judgments are somewhat analogous to conditions of probation in determining that bond forfeiture judgments are "forfeitures" within the meaning of § 523(a)(7) of the Bankruptcy Code. *Dobrek*, 419 F.3d at 264, noted that bond forfeiture judgments arise, in part, from the commercial sureties breach of duty to produce the defendants in court. *Dobrek*, 419 F.3d at 265, then considered the effect of a discharge of bond forfeiture debt in bankruptcy stating:

> In particular, allowing commercial bondsmen to discharge bail bond debts in bankruptcy could encourage the use of federal bankruptcy laws to evade the financial consequences of noncompliance with a bail bond agreement. Indeed, while bail forfeitures are "an anticipated cost of doing business," a bail bondsman would certainly prefer to avoid these debts. *Id.* at 294 n. 9. Should a commercial bondsman be allowed to discharge these debts in bankruptcy, bankruptcy could become an attractive option over satisfying one's financial obligations to the state. **Additionally, should the bail bond debts of a commercial bondsman be dischargeable in bankruptcy, the state's criminal proceedings may effectively be invalidated, triggering comity and federalism concerns.** The non-appearing or fugitive defendant would be out of the state's custody and the professional bondsman would no longer have any incentive to produce him in court. (Emphasis added).

The Court of Criminal Appeals in Texas stated in *Gibson v. State*, 401 S.W.2d 822, 825 (Tex.Crim.App. 1967) that:

> Insuring that the principal appear before the court at the time designated is the bondsmen's 'stock in trade' and, unless he is able to perform this service consistently, he will not long be in business. It therefore behooves bondsmen, as sound business practice, to impress upon the court and the principal alike that 'bail jumpers' for whom they are

> surety will inevitably be caught and returned to trial. The realization that their bond will be forfeited in the event the principal fails to appear might have the effect of making bondsmen somewhat more selective as to which persons they will act as surety, and it might increase the surveillance exercised by the surety over the principal while he is at large on bond, but it should not lessen the ardor with which the surety pursues the principal who fails to appear for his trial.

From a public policy point of view, requiring a bondsman to pay the bond when a principal fails to appear in court at the scheduled time makes the bondsman more responsive to his or her obligation to produce the principal in court. Requiring a bondsman to be more responsive to his or her obligations provides a dual public policy in that such requirement also protects the victims by seeing that justice is achieved through the production of the principal in court by the bondsman. "The primary object or purpose of an appearance bond is to secure the presence of a defendant at court upon trial of an accusation against him." *Fly v. State*, 550 S.W.2d 684, 685 (Tex.Crim.App. 1977). If a bondsman can simply file bankruptcy and thereby avoid his or her obligation to produce the principal in court, then the bonding process has failed its purpose and the purpose of an appearance bond has been nullified. On the other hand, if a bondsman fulfills his or her duty to produce the bond-skipping principal back in court then justice can be served and the bondsman does not have to pay

the full amount of the bond; only court costs, interest and return costs. TEX. CODE CRIM. PROC. ART. 22.13(a)(5). Allowing the bondsman to file bankruptcy and discharge bond forfeiture judgments removes any incentive for the bondsman to locate and bring to justice a bond-jumping principal, which a bondsman has a duty to do. Filing bankruptcy by a bondsman shifts the responsibility and expense of relocating and rearresting the bond-jumping principal unfairly and irresponsibly back to local law enforcement. Local law enforcement can ill afford the time and manpower to relocate and rearrest the bond-jumping principal. When Soileau filed for bankruptcy, she failed to bring to justice the fifty-five principals for whom she wrote bonds and she chose instead to shift her duty onto local law enforcement. Accordingly, the bonding procedure of the criminal justice system failed once it allowed a commercial bondsman's bond forfeiture judgments to be discharged by a bankruptcy court.

As this Court noted in *Katz*, 546 U.S. at 364, a discharge in bankruptcy " . . . gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." This concept does not apply in the present case since the fifty-five bond forfeiture judgments affect not just Soileau but rather they affect the criminal justice system. By Soileau failing to produce the fifty-five absent principals in court, it in turn affects the fifty-five victims as well; which brings the criminal justice system to a halt since there is no defendant present in court to answer the criminal charges. Public policy should not allow the

bankruptcy court to discharge Soileau's bond forfeiture judgments because by doing so, it prevents the fifty-five victims from receiving the justice due them.

In the present case, the concurring opinion, App. p. 23, footnote 48, states "Thus, it could be argued that the mere fact that this case concerns an *in rem* proceeding in bankruptcy does not end this court's analysis if the bankruptcy court's exercise of *in rem* jurisdiction offends traditional state sovereignty over its criminal justice system." The concurring opinion goes on to state, at App. p. 28:

> *Hood* and *Katz* stand for the proposition that a state may be treated as an ordinary creditor in bankruptcy as to its 'usual' contractual debts, but they do not answer the statutory question raised here. Informed by *Kelly*, I would hold that a bankruptcy court may not utilize its *in rem* jurisdiction to ride roughshod over this traditional bastion of state sovereignty, and I hope that our court will take this case en banc to reconsider *Hickman* and preserve the integrity and self-sufficiency of the State's criminal procedures.

This concurring opinion by Chief Judge Jones holds especially true in the present case since bond forfeiture judgments are not contractual debts. Rather, as set forth above in this Petition, bond forfeiture judgments are criminal in nature.

The State submits that based on *Hood*, *Katz*, *Kelly*, and *Dobrek* the State is entitled to sovereign immunity before the bankruptcy court on bond

forfeiture judgments in order to preserve the integrity and self-sufficiency of the State's criminal justice system.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

CHARLES A. ROSENTHAL, JR.
Harris County District Attorney

JAMES L. NORRIS*
KATHLEEN A.B. BRADDOCK
Assistant District Attorneys
Harris County, Texas

1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5824
**Counsel of Record*

Counsel for Petitioner

488 F.3d 302

United States Court of Appeals, Fifth Circuit.
In the Matter of: Geraldine H. SOILEAU, Debtor.
State of Texas, Appellant,
v.
Geraldine H. Soileau, Appellee.
No. 05-20501.

May 22, 2007.

James L. Norris (argued), Houston, TX, for Appellant.

Alva Nell Wesley-Thomas (argued), Tonya Monique Felix (argued), Houston, TX, for Soileau.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES, Chief Judge, and WIENER and PRADO, Circuit Judges.

PRADO, Circuit Judges.

WIENER, Circuit Judge:

The State of Texas ("the State") appeals the decisions of the bankruptcy and district courts denying the State's motion to dismiss the petition of Geraldine Soileau ("Soileau") for Chapter 7 bankruptcy protection. The State's challenge is grounded exclusively in Eleventh Amendment sovereign immunity, and the bankruptcy court and district court ruled on that ground alone. As the Supreme Court's decisions in *Central Virginia Community College v.*

Katz[1] and *Tennessee Student Assistance Corp. v. Hood*[2] establish that the discharge of a debt like Soileau's is not barred by such immunity, the bankruptcy court had jurisdiction. We therefore affirm the denial of the State's dismissal motion.

I. Facts and Proceedings

The facts pertinent to this case are undisputed. As a licensed bail bondsman, Soileau served as surety on bail bonds for numerous criminal defendants in Texas. Over time, fifty-five of these defendants absconded while out on bail. The State sued Soileau as those defendants' surety and obtained state court money-judgments against her. In April 2004, Soileau filed a petition under Chapter 7 of the Bankruptcy Code, in which she sought to discharge a total of $650,897.71 in such judgments.

Two weeks later, the State moved to dismiss on sovereign immunity grounds, claiming that its refusal to consent to being made a party to the bankruptcy proceedings deprived the bankruptcy court of jurisdiction over it. Shortly thereafter, the bankruptcy court denied the State's motion, relying on both *Hood* and on our pre-*Hood* and pre-*Katz* decision in *Hickman v. State of Texas* (*In re Hickman*).[3] The State

---

[1] 546 U.S. 356, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006).

[2] 541 U.S. 440, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004).

[3] 260 F.3d 400 (5th Cir.2001). As we shall more fully demonstrate below, the bankruptcy court's refusal to deny discharge of Soileau's judgment debts owed to the State was

(Continued on following page)

appealed to the district court, but it affirmed. The State then timely filed a notice of appeal to this court.

II. Analysis

A. Standard of Review

In reviewing cases originating in bankruptcy, we "perform the same function, as did the district court: Fact findings of the bankruptcy court are reviewed under a clearly erroneous standard and issues of law are reviewed *de novo*."[4]

B. Eleventh Amendment Sovereign Immunity: Hood and Katz

The only issue presented by this appeal is whether, on grounds of Eleventh Amendment sovereign immunity, the State may avoid discharge of Soileau's forfeiture judgments incurred as surety on bail bonds issued to the State in conformity with its

---

compelled by *Hood* alone; consideration of our earlier decision in *Hickman* was wholly unnecessary. Not only do *Katz* and *Hood* leave no doubt that sovereign immunity does not bar the discharge involved in this case, *Hickman* is inapposite, as the State here acknowledges, because it was neither based nor decided on a claim of sovereign immunity by Texas. *Hickman* was argued and decided exclusively on a statutory interpretation of the Bankruptcy Code. In contrast, the only legal theory asserted by the State today is Eleventh Amendment sovereign immunity, albeit the State noted in passing its continuing disagreement with *Hickman*.

[4] *Nationwide Mut. Ins. Co. v. Berryman Prods. (In re Berryman)*, 159 F.3d 941, 943 (5th Cir. 1998).

statutory scheme.[5] Under the Eleventh Amendment, the jurisdiction of the federal courts "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[6] As interpreted, however, the Eleventh Amendment is not limited to its text; the Supreme Court has "repeatedly held that an unconsenting State also is immune from suits by its own citizens."[7] Despite this general prohibition of suits against a non-consenting or non-waiving state, "[s]tates, nonetheless, may still be bound by some judicial actions without their consent."[8] *Hood* and *Katz,* both recent Supreme Court cases addressing sovereign immunity in the bankruptcy context, provide two such examples; and their holdings inform our analysis of the State's claim today.

In *Hood,* the debtor had signed promissory notes for educational loans guaranteed by the Tennessee Student Assistance Corporation ("TSAC"), a governmental corporation created by the State to administer student loans. Early in 1999, Hood filed a Chapter 7 bankruptcy petition and was granted a general

---

[5] As we discuss more fully below, the State did not argue, either before us or to the lower courts, that Soileau's debt should be nondischargeable by virtue of § 523(a)(7) of the Bankruptcy Code.

[6] U.S. Const. amend. XI.

[7] *Hood,* 541 U.S. at 446, 124 S.Ct. 1905 (collecting cases).

[8] *Id.*

discharge that did not cover her student loans. Later that year, Hood reopened her petition, filing an adversary proceeding against, *inter alia,* TSAC, seeking a determination by the bankruptcy court that her student loans were dischargeable. TSAC sought dismissal on sovereign immunity grounds.[9]

The bankruptcy court concluded that Hood's debt to the state was dischargeable, rejecting TSAC's contention that the court lacked jurisdiction because of sovereign immunity. A Bankruptcy Appellate Panel ("BAP") affirmed, as did the Sixth Circuit Court of Appeals thereafter.[10] The Supreme Court granted certiorari to determine whether the Bankruptcy Clause of the Constitution[11] "grants Congress the authority to abrogate state sovereign immunity from private suits."[12]

The *Hood* Court affirmed the BAP and the Court of Appeals, but did so without reaching the broader question whether 11 U.S.C. § 106(a)[13] is a valid abrogation

---

[9] *Id.* at 443-45, 124 S.Ct. 1905.

[10] *Id.* at 445, 124 S.Ct. 1905.

[11] The Bankruptcy Clause states that Congress shall have the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. 1, § 8, cl. 4.

[12] *Hood,* 541 U.S. at 443, 124 S.Ct. 1905.

[13] Section 106(a) provides, in part, "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unity . . . with respect to" delineated sections of the Bankruptcy Code. 11 U.S.C. § 106(a).

of sovereign immunity. The Court held more narrowly that "a proceeding initiated by a debtor to determine the dischargeability of a student loan debt is not a suit against the State for purposes of the Eleventh Amendment."[14] As the Court explained, "[t]he discharge of a debt by a bankruptcy court is . . . an *in rem* proceeding," as the bankruptcy court is concerned with the estate of the debtor.[15] The Court in *Hood* concluded that, "[a]t least when the bankruptcy court's jurisdiction over the res is unquestioned, our cases indicate that the exercise of its *in rem* jurisdiction to discharge a debt does not infringe state sovereignty."[16]

The Supreme Court went on in *Hood* to reject another of TSAC's contentions, *i.e.*, that because the proceedings to challenge the dischargeability of a student loan debt were inherently adversarial,[17] the discharge of the student loan debt was an infringement on state sovereignty. In rejecting this argument, the Court ruled that, despite the adversarial nature of the proceeding, "the bankruptcy court's jurisdiction is premised on the res, not the [sic] on the persona. . . .

---

[14] *Hood*, 541 U.S. at 443, 124 S.Ct. 1905.

[15] *Id.* at 447, 124 S.Ct. 1905 (The bankruptcy court's "jurisdiction is premised on the debtor and his estate, and not on his creditors.").

[16] *Id.* at 448, 124 S.Ct. 1905 (citation omitted).

[17] Under 11 U.S.C. § 523(a)(8), student loan debts guaranteed by the government are presumed to be nondischargeable. To obtain a discharge of these debts, the debtor must therefore demonstrate that excepting the debt from the discharge order would impose "undue hardship." 11 U.S.C. § 523(a)(8).

A debtor does not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor does he subject an unwilling State to a coercive judicial process. He seeks only a discharge of his debts."[18] Accordingly, the Court held that, for purposes of the Eleventh Amendment, the undue-hardship determination under § 523(a)(8) of the Bankruptcy Code is not a suit against the state.[19]

In *Katz,* decided two years after *Hood* and two years after Soileau filed her Chapter 7 petition, the Court assayed to answer the question left open in *Hood, viz,* "whether Congress' attempt to abrogate the states sovereign immunity in 11 U.S.C. § 106(a) is valid."[20] *Katz* involved a proceeding initiated by a bankruptcy trustee under Sections 547(b) and 550(a) of the Bankruptcy Code to set aside the debtor's pre-petition preferential transfers of funds to state agencies.[21] The State contended that sovereign immunity

---

[18] *Hood,* 541 U.S. at 450, 124 S.Ct. 1905.

[19] *Id.* at 451, 124 S.Ct. 1905.

[20] *Katz,* 546 U.S. 356, 126 S.Ct. 990, 995, 163 L.Ed.2d 945 (2006).

[21] Section 547(b) of the Bankruptcy Code states:

> Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made –
>
> (A) on or within 90 days before the date of the filing of the petition; or

(Continued on following page)

barred the proceedings to avoid and recover the preferential transfers.[22] The Court concluded that the transfer did not offend state sovereign immunity, holding that, "[i]n ratifying the Bankruptcy Clause [of the United States Constitution], the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction

---

> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if –
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

Under Section 550(a) of the Bankruptcy Code,

> [e]xcept as otherwise provided in this section, to the extent that a transfer is avoided under[, *inter alia*,] section . . . 547 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a).

[22] *Katz*, 126 S.Ct. at 994-95.

of the bankruptcy courts."[23] Discussing the transfer involved in *Katz,* the Court held that "[i]nsofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity."[24]

C. Application of Hood and Katz

Applying *Hood* and *Katz* to the instant case, we conclude that the State here has no claim to sovereign immunity. Whatever uncertainty there may be as to the outer limits of the holdings of *Katz* and *Hood,* at the very least they together establish beyond cavil that an *in rem* bankruptcy proceeding brought merely to obtain the discharge a debt or debts by determining the rights of various creditors in a debtor's estate – such as is brought here – in no way infringes the sovereignty of a state as a creditor.[25]

---

[23] *Id.* at 1005.

[24] *Id.* at 1002.

[25] *Katz,* 126 S.Ct. at 1000 ("In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts."); *Hood,* 541 U.S. at 448, 124 S.Ct. 1905 ("At least when the bankruptcy court's jurisdiction over the res is unquestioned, our cases indicate that the exercise of its *in rem* jurisdiction to discharge a debt does not infringe state sovereignty.").

There can be no serious question that the proceeding at issue here is purely *in rem*: The bankruptcy court's exercise of jurisdiction is focused only on Soileau's estate. *Katz* describes three crucial facets of the exercise of *in rem* jurisdiction that prevent it from interfering with state sovereign immunity: (1) exercise of jurisdiction over the estate of the debtor, (2) equitable distribution of the estate's property among creditors, and (3) discharge.[26] In this case, the State challenges the *in rem* discharge of a debt, a specie of imposition on the states' sovereignty undeniably countenanced by *Katz* and *Hood*.

To the extent that *Hood* implies in a footnote that there could possibly be some exercise of *in rem* jurisdiction that conceivably might offend the sovereignty of the state,[27] "such concerns are not present

---

[26] *Id.* at 996 ("Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts.").

[27] *Hood*'s footnote 5 states:

> This is not to say, "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity," as Justice Thomas characterizes our opinion, but rather that the court's exercise of its jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State. Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State. No such concerns are present here, and we do not address them.

(Continued on following page)

here."[28] Indeed, Soileau's is even a stronger case for rejection of the State's sovereign immunity defense than was *Hood*'s or *Katz*'s. *Hood*, after all, addressed an adversarial proceeding involving a state, and *Katz* addressed an order for the avoidance of preferential transfers to a state to allow the trustee to recoup those transfers from the state's treasury – each proceeding carrying with it some of the trappings traditionally associated with a suit against a state. Soileau's, in contrast, carries none: She is neither seeking the return of any funds already in the State's possession nor bringing an adversarial proceeding against the State. She asks nothing more than that the bankruptcy court exercise its *in rem* jurisdiction over her bankruptcy estate by adjudicating the rights of the State as a creditor. As such an exercise of *in rem* jurisdiction is indisputably contemplated by *Katz*,[29] the State's sovereign immunity claim must fail.

Hood, 541 U.S. at 451 n. 5, 124 S.Ct. 1905 (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992)).

[28] *Id.*

[29] *Katz*, 126 S.Ct. at 1004 ("The ineluctable conclusion, then, is that States agreed in the plan of the Convention not to assert *any* sovereign immunity defense they might have had *in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'*") (emphasis added).

D. Hood's Footnote Five and Hickman

That should be the end of this appeal, disposing of the case as it does on the sole issue raised by the State, *viz.*, sovereign immunity. But our co-panelist ("the Concurrer") has opted to make a collateral attack on our six-year old precedent in *Hickman v. Texas*'s[30] construction of § 523(a)(7) of the Bankruptcy Code. In the special concurrence, the concurrer writes that, although "*Hood* and *Katz* may dispose of any Eleventh Amendment sovereign immunity claim that Texas could[31] raise here, . . . those cases do not resolve whether the Bankruptcy Code in fact authorizes the discharge of Soileau's defaulted bail bonds." The Concurrer urges that, because our prior precedent in *Hickman* requires us to find that Soileau's judgment debt was contractual in nature, we are "bound to apply *Hickman* and reject the State's nondischargeability claim." The gravamen of the Concurrer's writing is that *Hickman* was wrongly decided, so we should now rehear Soileau's case *en banc* to abrogate the 2001 rule in *Hickman*. We respectfully disagree with that proposal. Here's why.

---

[30] 260 F.3d 400, 406 (5th Cir.2001).

[31] The Concurrer's use of "could" here is misleading, as it suggests that it is merely theoretical that the State might raise this claim when the State *has* raised a sovereign immunity claim. In contrast, it *has not* challenged the dischargeability of the debt under § 523(a)(7), implicitly acknowledging that our precedent in *Hickman* forecloses such a claim.

In *Hickman,* as here, a bail bondsman filed for bankruptcy, seeking to discharge all debt from her bail bond business. The State filed a complaint to determine whether her debts to it were dischargeable. Significantly, Texas did not claim Eleventh Amendment sovereign immunity in *Hickman* as it does here against Soileau, arguing in *Hickman* only that, because the debt was a forfeiture, it was nondischargeable under the Bankruptcy Code, specifically 11 U.S.C. § 523(a)(7). This provision of the Bankruptcy Code specifies, in relevant part, that the debt of an individual debtor is nondischargeable to "the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit." The *Hickman* bankruptcy court agreed with the State, but the district court reversed, holding that bail bond forfeitures were not the type of penal forfeiture contemplated by § 523(a)(7).[32] Neither opinion turned on sovereign immunity or on § 106(a) of the Bankruptcy Code. Neither, as we shall show, did the *Hickman* opinion turn on the contractual nature of the debtor's bail bond obligation to the State, as the Concurrer represents it.

On appeal, we held that:

> [Bankruptcy Code section] 523(a)(7) excludes from discharge only those forfeitures imposed because of misconduct or wrongdoing by the debtor. Hickman's debt arising from

---

[32] *In re Hickman*, 260 F.3d at 401.

> her failure to fulfill her contractual obligation to the State as a surety on a criminal bail bond is not the sort of punitive or penal forfeiture rendered nondischargeable by § 523(a)(7).[33]

In so holding, we expressly rejected the argument advanced by Texas that finding bail bond forfeiture debts dischargeable would undermine the effective administration of its criminal justice system.[34]

With due respect to the position advocated in the special concurrence, this case is not the appropriate vehicle for a reexamination of *Hickman*'s holding, as the State has not advanced what the Concurrer refers to as a "nondischargeability claim." Rather, the only legal theory asserted by the State both today and before the lower courts is Eleventh Amendment sovereign immunity. In its brief to us, for example, the State clarified that its "[m]otion in the present case claims sovereign immunity. *The State does not even raise an issue concerning the dischargeability of Soileau's criminal bail bond forfeiture judgments.*"[35] Likewise, at oral argument, the State observed that "this case is not concerned directly with the issue of whether the Fifth Circuit's decision [regarding the dischargeability of bail bond judgments in *Hickman*] is accurate."

---

[33] *Id.*

[34] *Id.* at 406.

[35] (Emphasis added).

Although both the State and the lower courts did address *Hickman,* they did so only in the context of determining whether, under *Hood*'s footnote five, discharge in the instant case would offend the State's sovereign immunity, not whether the debt was dischargeable *vel non.* Indeed, the State criticized the lower courts in its brief to us, asserting that they had "fail[ed] to distinguish and apply the State's claim of sovereign immunity from the question of dischargeability of debt with both courts relying on the *In re Hickman* case, which . . . did not even involve a sovereign immunity issue."[36] The special concurrence similarly conflates the State's sovereign immunity argument with this so-called "nondischargeability claim" – a claim not advanced to us or to the lower courts. As the issue of dischargeability was never raised,[37] we limit our holding to the issue before us – whether discharge of Soileau's debt impermissibly infringes on the State's sovereign immunity.

---

[36] In its reply, the State does suggest that "the Fifth Circuit, in light of [the Third Circuit's holding in *Dobrek v. Phelan,* 419 F.3d 259 (3d Cir.2005)], may wish to reconsider its position in *Hickman* . . . on the dischargeability of criminal bond forfeiture judgments." Nevertheless, Texas does not expressly challenge the dischargeability of Soileau's debts under § 523(a)(7) in the face of our binding precedent in *Hickman*; rather, it concludes by requesting that "the decisions of the bankruptcy court and the district court be reversed allowing the State to claim sovereign immunity in the bankruptcy court."

[37] *See Robinson v. Guarantee Trust Life Ins. Co.,* 389 F.3d 475, 481 n. 3 (5th Cir.2004) ("Failure adequately to brief an issue on appeal constitutes waiver of that argument.").

Even assuming *arguendo,* however, that there is in fact a "statutory question raised here," as the Concurrer suggests, *Hickman*'s holding that § 523(a)(7) only excludes from discharge those debts incurred by wrongdoing or misconduct – and that judgments against the *sureties* on bail bonds (as distinguished from "forfeitures" by the defaulting principals), such as the one at issue here are dischargeable – should not be revisited. Although no effort to rehear *Hickman* was mounted before its mandate issued in 2001, the Concurrer now seeks to use the instant appeal to challenge *Hickman en banc* by contending "[t]hat Soileau owes a forfeiture debt to a governmental entity should be dispositive" that the debt is nondischargeable. Contrary to the Concurrer's position, however, *Hickman*'s interpretation of § 523(a)(7) is consistent with the established definitions of that section's exclusive trio of fines, penalties, and forfeitures.

From the standpoint of statutory construction, "forfeiture" in § 523(a)(7) must be understood in light of its relationship to the other nouns in that section's exclusive list, *i.e.,* "fine" and "penalty." According to Black's Law Dictionary, a forfeiture is: (1) "[t]he divestiture of property without compensation," (2) "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty," (3) "[s]omething (esp. money or property) lost or confiscated by this process; a penalty", (4) "A destruction or deprivation of some estate or right because of the failure to perform some obligation or condition contained in the

contract."[38] The American Heritage Dictionary defines a forfeiture as "the act of surrendering something as a forfeit,"[39] then defines forfeit as "something surrendered as punishment for a crime, offense, error, or breach of contract."[40] Although these definitions alone might leave open the possibility that the type of judgment debt at issue here should be considered a forfeiture for purposes of § 523(a)(7), Congress's synonymizing use of "forfeiture" with "penalty" and "fine" supports *Hickman*'s more narrow interpretation of this section as applicable only to takings grounded in wrongful acts and effectuating a punishment therefor.[41] In *Hickman*, we explained:

> A penalty is "[a]n elastic term with many different shades of meaning; it involves [the] idea of punishment, corporeal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment." Black's Law Dictionary 1133 (6th ed.1990). Central to the definition of penalty is the "idea of punishment" – "[p]unishment imposed on a wrongdoer, esp. in the form of imprisonment or fine. Though usu. for

---

[38] *Black's Law Dictionary* 677 (8th ed.2004).

[39] *American Heritage Dictionary* 515 (ed. William Morris, 1976).

[40] *Id.*

[41] As we recognized in *Hickman*, "a word is known by the company it keeps." *In re Hickman*, 260 F.3d at 403 (quoting *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995)).

> crimes, penalties are also sometimes imposed for civil wrongs." Black's Law Dictionary 1153 (7th ed.1999). The term penalty, however, may also include "[t]he sum of money which the obligor of a bond undertakes to pay in the event of his omitting to perform or carry out the terms imposed upon him by the conditions of the bond," Black's Law Dictionary 1133 (6th ed.1990), or "[e]xcessive liquidated damages that a contract purports to impose on a party that breaches." Black's Law Dictionary 1153 (7th ed.1999). Although focusing on punishment for criminal and civil wrongs, the definition of penalty, like forfeiture, could be read expansively to include the [bail bondsman's] debt. A fine, on the other hand, relates solely to "[a] pecuniary punishment or civil penalty payable to the treasury." Black's Law Dictionary 647 (7th ed.1999).[42]

The *Hickman* court summarized, "[t]he definitions of penalty and fine reflect the traditional understanding of the these terms as punitive or penal sanctions imposed for some form of wrongdoing. Their inclusion in § 523(a)(7) implies that Congress intended to limit the section's application to forfeitures imposed upon a wrongdoing debtor."[43]

---

[42] *Id.* at 403-04.

[43] *Id.* at 404.

Mindful of "the principle that exceptions to discharge are to be narrowly construed,"[44] we agree with *Hickman*'s interpretation of § 523(a)(7) as excepting from discharge only those debts incurred as a result of misconduct or wrongdoing. Indeed, this holding is consistent with the purpose of the Bankruptcy Code and, specifically, with § 523(a).[45] We cannot overemphasize here the importance of the distinction between the absconding criminal defendants as principals and the bail bondsmen as sureties: The former would properly be denied discharge on their own cash or property bonds as "forfeitures" in the § 523(a)(7) sense, but the latter are not forfeiting wrongdoers; they are ordinary judgment debtors who

---

[44] *Id.* at 404 (quoting *In re Tran*, 151 F.3d 339, 342 (5th Cir.1998)); *see also In re Walker*, 48 F.3d 1161, 1164-65 (11th Cir.1995) (noting "obligation to construe strictly exceptions to discharge to give effect to the fresh start policy of the Bankruptcy Code").

[45] *Lines v. Frederick*, 400 U.S. 18, 19, 91 S.Ct. 113, 27 L.Ed.2d 124 (1970) (per curiam) ("The most important consideration limiting the breadth of the definition of 'property' lies in the basic purpose of the Bankruptcy Act to give the debtor a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. The various provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act.' ") (*quoting Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) (citations omitted)); *In re Cross*, 666 F.2d 873, 880 (5th Cir.1982) ("The exceptions to discharge found in [§ 523(a)] were designed to prevent the bankrupt from avoiding through bankruptcy the consequences of certain wrongful acts . . . ").

are not guilty of any wrongful conduct that should prohibit discharge in bankruptcy.

The Concurrer maintains that "*Hickman*'s conclusion that '[b]ail bond judgments are not penal sanctions . . . but rather arise from a contractual duty,' is . . . at odds with over a century of Texas precedent" characterizing bail bond judgments as criminal in nature. Whatever the merits of this argument, it fails to render the debts at issue nondischargeable, as determination of the dischargeability of judgment debts like Soileau's does not turn on whether that debt was contractual, statutory, or criminal in nature. Rather, it turns on whether the debt was incurred as a result of the bail bondsman's wrongful acts. A bail bondsman's judgment debt to the state, arising as it does solely from a criminal defendant's wrongful act of absconding, is not the result of any act of misconduct or wrongdoing by the bail bondsman. As the Fourth Circuit observed in *In re Collins,*

> "[i]t cannot be said that [the bail bondsman] was being punished by virtue of incurring these [bail bond] obligations. [He] committed no criminal or penal act which gave rise to such debts. These bail bond forfeiture obligations, as to [him], arose from a purely financial and contractual arrangement."[46]

---

[46] *In re Collins,* 173 F.3d 924, 932 (4th Cir.1999) (quoting *In re Paige,* No. 86 B 8072 C, 1988 WL 62500, *4 (Bankr.D Colo. Apr.15, 1988)).

This is so whether the proceedings to recover the judgment debt are labeled criminal or contractual. Thus, Soileau's judgment debts are properly dischargeable – even though, we repeat, *that question is not presented here.*

Allowing Soileau's debts to the State to be discharged, insists the Concurrer, would impermissibly "invalidate the results of state criminal proceedings," as the Supreme Court has instructed the federal courts may not do.[47] We do not question the degree of importance of the bail bond surety in the broad scheme of Texas's criminal justice system. We disagree, however, that the discharge of the bail bondsman's debt "invalidate[s] the results of state criminal proceedings." Bail bonds in state criminal proceedings, after all, are designed primarily to make criminal defendants either (1) appear or (2) pay a forfeiture – only secondarily to make bail bondsmen pay. The State's (and the Concurrer's) parade of horribles that today's holding will produce in relation to the administration of its criminal justice system is at best entirely speculative hyperbole; in fact, it is belied by the apparent continued functioning of the Texas criminal justice system in the years since *Hickman.*

This simply is not a situation, as likewise hyperbolized by the Concurrer in today's special concurrence, wherein the bankruptcy court is accused of

---

[47] *Kelly v. Robinson,* 479 U.S. 36, 47, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986).

using "its *in rem* jurisdiction to ride roughshod over this traditional bastion of state sovereignty." Rather, to a much lesser degree than in either *Katz* or *Hood,* the bankruptcy court here is discharging a debt by determining the rights of the State as a creditor, a quintessential exercise of its *in rem* jurisdiction that indisputably is permitted under *Hood* and *Katz.* It matters not under those Supreme Court cases whether the State's judgments against Soileau arose from contracts or forfeitures or torts or strict liability.

III. Conclusion

The State has sought to avoid discharge of judgments that were rendered in state court against Soileau as the statutory surety on bail bonds that she wrote under Texas's scheme for the release of criminal defendants pending future appearances. Having earlier failed, in *Hickman,* to avoid this precise kind of discharge on non-constitutional grounds of statutory interpretation of the Bankruptcy Code, Texas has here taken a second bite at that apple but on an entirely different tack, basing its affirmative efforts to avoid discharge *solely* on the constitutional ground of Eleventh Amendment sovereign immunity. Yet the Supreme Court, in *Hood* and *Katz,* has left no doubt that the several states remain immutably bound by their long-standing waivers of sovereign immunity under the Bankruptcy Clause of the United States Constitution, at least as to non-adversary *in rem* discharge proceedings in bankruptcy, like this one.

Accordingly, the judgment of the bankruptcy court, and the district court's affirmance of it, are

AFFIRMED.

EDITH H. JONES, Chief Judge, specially concurring:

I concur in the judgment only. With due respect to the majority, *Hood* and *Katz* may dispose of any Eleventh Amendment sovereign immunity claim that Texas could raise here,[1] but those cases do not resolve whether the Bankruptcy Code in fact authorizes the discharge of Soileau's defaulted bail bonds. Currently, this court's precedent equates default on bail

---

[1] The majority's conclusion is probably correct; nevertheless, the scope of *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), is not unlimited. The Supreme Court specifically noted that it was not holding that every "exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State." *Id.* at 451 n. 5, 124 S.Ct. at 1913. Although the Court's broader decision in *Central Virginia Community College v. Katz*, 546 U.S. 356, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006), made clear that even actions ancillary to a bankruptcy court's exercise of its *in rem* jurisdiction will not "in the usual case" offend state sovereignty, the Court did not permit bankruptcy courts always to exercise their jurisdiction without regard to state sovereignty. *Id.* at 1000. Contractual debts owed to the State are now fair game for bankruptcy resolution, but *Katz* and *Hood* recognize that there are still areas of traditional state sovereignty into which the bankruptcy courts cannot tread. *See also, State of Texas v. Walker*, 142 F.3d 813 (5th Cir.1998). Thus, it could be argued that the mere fact that this case concerns an *in rem* proceeding in bankruptcy does not end this court's analysis if the bankruptcy court's exercise of *in rem* jurisdiction offends traditional state sovereignty over its criminal justice system.

bonds with any other contractual obligation and holds such debts dischargeable. *Hickman v. Texas (In re Hickman),* 260 F.3d 400, 406 (5th Cir.2001). The State has consistently argued, however, and I agree that *Hickman* was wrongly decided. While this panel is bound to apply *Hickman* and reject the State's non-dischargeability claim, I urge the court to rehear this case en banc and overturn *Hickman.*

Standing alone, the Bankruptcy Code appears to render Soileau's debt for bond forfeitures nondischargeable. Section 523(a)(7) of the Code states that a debt is nondischargeable "to the extent such debt is for a fine, penalty, *or forfeiture* payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty." 11 U.S.C. § 523(a)(7) (emphasis added). The panel in *Hickman* interpreted this language to mean that only "punitive or penal forfeiture[s]" were non-dischargeable, and that bail bond forfeitures, which it erroneously interpreted as contractual in nature, were not covered by § 523(a)(7). *Id.* at 406.

A better approach to § 523(a)(7) was taken by a Third Circuit panel (including now-Justice Alito) that held commercial bail bond forfeitures nondischargeable within the plain meaning of § 523(a)(7). *Dobrek v. Phelan,* 419 F.3d 259 (3d Cir.2005). As *Dobrek* correctly points out, regardless whether bail bonds are contractual in nature, there is no basis for *Hickman*'s holding that § 523(a)(7) "is restricted in scope to exempt from dischargeability only obligations of a [purely] penal nature," as "forfeitures" are included in

§ 523(a)(7) without respect to their nature. *Dobrek,* 419 F.3d at 267 (quoting *City of Philadelphia v. Nam (In re Nam)*, 273 F.3d 281, 287 (3d. Cir.2001)). That Soileau owes a forfeiture debt to a governmental entity should be dispositive here.

Moreover, state criminal proceedings are not the "usual case" in bankruptcy, and the Supreme Court has refused to allow bankruptcy jurisdiction to interfere with this traditional realm of state authority. In *Kelly v. Robinson,* 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986), the Supreme Court noted its "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings. The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States." *Id.* at 47, 107 S.Ct. at 360. Neither *Hood* nor *Katz* conflicts with *Kelly,* whose authoritativeness we inferior courts must recognize. Thus, the question whether bail bond forfeitures in Texas are criminal matters is critical to determining the scope of § 523(a)(7). In this regard, *Hickman* seriously misinterpreted Texas law when it held that bail bonds are essentially contractual, not penal, obligations.

As early as 1854, in *Gay v. State,* 20 Tex. 504 (1857), the Texas Supreme Court classified bail bond forfeitures as criminal matters. Again, in *Jeter v. State,* 86 Tex. 555, 26 S.W. 49 (Tex.1894), the Texas court concluded that a proceeding for the forfeiture of bail bonds is "a criminal case within the Constitution and laws of the State." 86 Tex. at 557, 26 S.W. 49

(citing *Gay*). As seminal criminal law precedents, *Gay* and *Jeter* have been repeatedly reaffirmed in recent years. *See, e.g., Ex Parte Burr,* 185 S.W.3d 451, 452-53 (Tex.Crim.App.2006); *Bailout Bonding Co. v. State,* 797 S.W.2d 275, 277 (Tex.App.1990); *State v. Sellers,* 790 S.W.2d 316, 321 (Tex.Crim.App.1990); *State ex rel. Vance v. Routt,* 571 S.W.2d 903, 906 (Tex.Crim.App.1978) ("[There is] no doubt that a bond forfeiture proceeding is 'criminal in nature.'").

Hickman's conclusion that "[b]ail bond judgments are not penal sanctions . . . but rather arise from a contractual duty," is thus at odds with over a century of Texas precedent. *Hickman,* 260 F.3d at 406. The panel in *Hickman* relied almost exclusively upon *Reyes v. State,* 31 S.W.3d 343 (Tex.App.2000), a state appeals court decision which held that "[b]ail bonds are contracts between the surety and the State." *Id.* at 345. Based on *Reyes, Hickman* reasoned that the State's classification of bail bonds as forfeitures (*i.e.,* criminal in nature) was a mere "label," masking their contractual nature. *Hickman,* 260 F.3d at 405. Such reliance on *Reyes* was in error. First, the conclusion in *Reyes* that bail bonds are contractual in nature must be put in context. *Reyes* concerned a bondsman whose client had absconded; the bondsman wished to be released from liability to the State. The *Reyes* court held only that the Texas Code of Criminal Procedure would not allow the bondsman to be released from his obligation to the State absent a showing that the bonded defendant failed to appear in court due to "an uncontrollable circumstance that arose from no fault

on his [the defendant's] part"; it did not purport to overrule nearly one hundred fifty years of state precedent. *Reyes,* 31 S.W.3d at 346-47. Further, if *Reyes* did in fact re-examine the nature of bail bonds in Texas, it did so without a single mention of *Gay, Jeter*, or their progeny.

Bailout Bonding, another Texas Court of Appeals case, provides a more complete assessment of the State's practices. There, the court noted that although "the surety's liability on the appearance bond would appear to be contractual," in actuality, the "judgment on a bond is not in the nature of a violation of contract." *Bailout Bonding,* 797 S.W.2d at 277. *Bailout Bonding* relied upon *General Bonding & Casualty Insurance Co. v. State,* 73 Tex.Crim. 649, 165 S.W. 615 (1913), which held that though "the action [on the forfeiture of an appearance bond] is not directly to punish the offender . . . it partakes of punishment for an offense against the state, and is not in the nature of a violation of a contract." *Id.* at 617. In Texas, notwithstanding that the Texas Code of Criminal Procedure Article 22.10 applies certain civil court rules to bail bond proceedings, forfeiture judgments have always been regarded as "penal judgment[s], that is, a judgment in the nature of a fine." *Bailout Bonding,* 797 S.W.2d at 277; *see also Magless v. State,* 112 Tex.Crim. 646, 18 S.W.2d 669, 670 (1929) ("It is plain, we think, that the sum recoverable for non-compliance with the conditions of a bail bond is a penalty."). In sum, even if the initial relationship between a surety and the State has elements of

contract according to *Reyes,* a forfeiture judgment does not, and is instead a criminal matter.

Finally, assuming arguendo that bail bonds are contracts, even the *Hickman* panel conceded that a "bail bond contract is *sui generis,*" and "is certainly distinguishable from the typical contract." *Hickman,* 260 F.3d at 406. *Hickman* correctly noted that a bail bond is an "integral and essential tool in the administration of the State's criminal justice system." *Id.* Regardless whether the forfeiture judgment is against a criminal defendant or his sureties, "[a criminal] case is too closely connected with the judgment on the bail bond to be separable from it." *Jeter,* 86 Tex. at 558, 26 S.W. 49. A bail bond proceeding concerns "an instrument to coerce the accused to take his trial; a power incident to every criminal court", and not a mere civil contract. *Id.*

The fear expressed in *Kelly,* that the bankruptcy courts would "invalidate the results of state criminal proceedings by erasing debts" is made reality if Soileau is granted a discharge from her debts to the State. *Dobrek,* 419 F.3d at 265. If bail bondsmen can obtain discharge in bankruptcy of forfeited bond debts, they plainly have less incentive to supervise and assure the appearance of their clients at trial.

Hood and *Katz* stand for the proposition that a state may be treated as an ordinary creditor in bankruptcy as to its "usual" contractual debts, but they do not answer the statutory question raised here. Informed by *Kelly,* I would hold that a bankruptcy court

may not utilize its *in rem* jurisdiction to ride roughshod over this traditional bastion of state sovereignty, and I hope that our court will take this case en banc to reconsider *Hickman* and preserve the integrity and self-sufficiency of the State's criminal procedures.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	
GERALDINE H. SOILEAU	§	Civil No. 04-3655
	§	
Debtor.	§	

MEMORANDUM AND ORDER

The State of Texas appeals from a Memorandum Opinion and Order denying the State's Motion for Dismissal Based on Sovereign Immunity (the "*Motion*").

BACKGROUND

Debtor Geraldine H. Soileau was a licensed bail bondsman who incurred substantial liability to the State because she had served as surety on criminal bail bonds for criminal defendants who subsequently absconded. In her bankruptcy schedules, Debtor listed bail bond forfeiture judgments owed to the State, and sought to discharge those obligations.

The State filed its Motion arguing that the bankruptcy court does not have jurisdiction to discharge Debtor's obligations to the State because of the sovereign immunity afforded states by the Eleventh Amendment. The State relied, in the bankruptcy court, and here, on *In the Master of Estate of Fernandez*, 123 F.3d 241, 246 (5th Cir. 1997), in which the court held that Congress did not have the power,

pursuant to the bankruptcy clause of Article I of the Constitution, to abrogate state sovereign immunity. The bankruptcy court denied the Motion primarily relying on *Tennessee Student Assistance Corp. v. Hood*, 124 S.Ct. 1905 (2004), in which the Supreme Court held that a bankruptcy discharge of a student loan debt does not implicate Eleventh Amendment immunity.

DISCUSSION

The bankruptcy court, as well as the parties, have been careful to note that the Supreme Court, in *Hood* did not decide the question whether the bankruptcy clause of Article I, or congressional action thereunder, could abrogate, or has abrogated, states' Eleventh Amendment immunity. 124 S.Ct. at 1913, n.5. But the Court's reasoning does strongly suggest that debts owed the states from contractual obligations can generally be discharged in bankruptcy.

Moreover, binding Fifth Circuit precedent makes clear "under the present structure of the Texas bail bond system the role of the surety is essentially contractual." *Hickman v. State of Texas*, 260 F.3d 400, 406 (5th Cir. 2001). Although *Hickman* is distinguishable from this case in that the State voluntarily appeared in the bankruptcy proceeding and did not assert sovereign immunity, that distinction does not attenuate the holding that the nature of a bondsman's obligation to the State is contractual.

The State believes *Hickman* to be wrongly decided. In particular, the State believes *Hickman* to have misapprehended authoritative decisions of Texas state courts as to the nature of a bondsman's obligation to the State. The State -- not unreasonably -- argues that the obligations of a bail bondsman to the State are much different from the obligation of a student borrower to the state entity that holds the pertinent debt instrument.

Nonetheless, this Court – mindful of its inferior status relative to the court of appeals – cannot ignore or creatively curtail the Fifth Circuit's holding in *Hickman*.

The decision of the bankruptcy court is **AFFIRMED**.

IT IS SO ORDERED.

SIGNED the 3rd day of June, 2005.

/s/ Keith P. Ellison
Keith P. Ellison
United States District Judge

TO INSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

In re:	§	
GERALDINE H. SOILEAU	§	**Case No. 04-34437**
	§	**(Chapter 7)**
Debtor.	§	
	§	

MEMORANDUM OPINION AND ORDER

The following is this Court's Memorandum Opinion on its denial of the Motion of the State of Texas for Dismissal Based on Sovereign Immunity (docket # 18).

On March 26, 2004 (the "Petition Date"), Geraldine Soileau (the "Debtor") filed for relief under chapter 7 of the Bankruptcy Code. On her petition, the Debtor listed bail bond forfeiture judgments in the amount of $650,897.71 owed to the State of Texas (the "State"). On May 12, 2004, the State filed its Motion for Dismissal claiming sovereign immunity pursuant to the Eleventh Amendment of the U.S. Constitution and requesting that it be dismissed as party to the bankruptcy proceedings on that basis. The State asserted that it did not consent to being made a party to the bankruptcy by the Debtor's attempt to discharge the debt she owed to the State. The Debtor objected to the dismissal of the State and this Court requested further briefing on the issue.

The United States Supreme Court's recent decision in *Tennessee Student Assistance Corporation v. Hood* appears to be directly on point with respect to the State's sovereign immunity argument. 124 S. Ct. 1905; 158 L. Ed. 2d 764 (2004). In *Tennessee,* the Supreme Court held that the Bankruptcy Court's discharge of a student loan debt does not implicate a State's Eleventh Amendment immunity.[1] 124 S. Ct. at 1912-13. The State argues, however, that footnote 5 of the *Tennessee* decision creates an exception by which this Court's considering, altering, canceling or discharging the bond forfeiture judgments owed by the Debtor would affront the State's sovereign immunity. Footnote 5 states as follows:

> This is not to say, "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity," as Justice Thomas characterizes our opinion, *post,* at 1919, but rather that the court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State. Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State. No such concerns are present here, and we do not address them.

124 S. Ct. at 1913, n.5 (citations omitted).

---

[1] For further discussion of the Supreme Court's *Tennessee* decision and its implications, *see also*, Michael J. Lichtenstein. *Supreme Court Ducks Sovereign Immunity-Question: A Recap of the Remaining Circuit Conflicts*, 23 AM. BANKR. INST. J. 6 (2004).

The State asserts that if this Court were to act in any way with respect to the bond forfeiture judgments, this would affect the Texas criminal justice system and thereby fall within the footnote 5 "exception." The Court believes that this argument fails. The Fifth Circuit has previously ruled that debts arising from bail bond forfeitures are dischargeable. *Hickman v. State of Texas (In re Hickman)*, 260 F.3d 400 (5th Cir. 2001). In reaching this conclusion, the Fifth Circuit determined that "under the present structure of the Texas bail bond system the role of the surety is essentially contractual." *Id.* at 406. Thus, the nature of the debt owed as a result of a bond forfeiture judgment, as well as the nature of the relationship between the surety (in this case the Debtor) and the State, is simply contractual. Because of the contractual nature of the debt and the relationship, this Court does not see how this Court's considering, altering, canceling or discharging the bond forfeiture judgments is an affront to the State's sovereign immunity. While the State argues that the Fifth Circuit's conclusion in *Hickman* that bond forfeiture cases are "essentially contractual" civil cases is incorrect and that bond forfeiture cases are in fact criminal in nature and thus governed by the State's criminal justice system, this Court is not in a position to challenge the Fifth Circuit's reasoning. Furthermore, this Court *agrees* with *Hickman's* reasoning and rationale. The State is essentially conducting credit transactions – risky credit transactions at that – given that Texas permits a bail bond license holder to execute bail bonds in an aggregate

amount of up to ten times the value of the property held as security. Accordingly, Texas could avoid the issue presented in this case by improving its credit determinations.

Texas devotes much of its brief to a recitation of the historic antecedents to bail bond law. Texas administers its bail bond system through its criminal – rather than its civil – court system. *See* TEX. CODE CRIM. PROC. ANN. ART. 17 (Vernon 2004). Texas may choose to administer its bail bond system in the manner that it sees fit. However, this choice does not alter the essential characteristics identified by the Fifth Circuit. The Debtor in this case is not the accused in a criminal case; the Debtor was authorized by Texas to assure the accused's appearance. While the accused's liberty is at stake in a bond forfeiture proceeding, a person issuing a bail bond is only subject to a financial forfeiture. For rather obvious reasons, it is more efficient for Texas to administer its bond forfeitures through the criminal system. Despite this efficiency, the forfeiture process is a contractual one. Texas is free to change its bond licensing procedures to eliminate Texas's credit risk. However, bankruptcy laws deal with the failure of credit risks. So long as Texas elects to take credit risk, there is no reason that its credit decisions should not be subject to the uniform laws on bankruptcy adopted by Congress.

Texas's motion for dismissal is denied.

Signed at Houston, Texas on August 18, 2004.

/s/ Marvin Isgur
Marvin Isgur
UNITED STATES
BANKRUPTCY JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20501

In The Matter Of: GERALDINE H SOILEAU
Debtor

STATE OF TEXAS
Appellant

v.

GERALDINE H SOILEAU
Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 5/22/05, 5 Cir., ___, ___ F.3d ___)

(Filed Aug. 08, 2007)

Before JONES, WIENER and PRADO

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

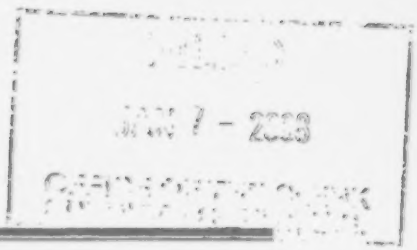
/s/ [Illegible]
United States Circuit Judge

OPPOSITION BRIEF

79

2

No. 07-482



-IN THE-

Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

v.

GERALDINE H. SOILEAU,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Alva Wesley-Thomas
Attorney at Law
6161 Savoy, Suite 250
Houston, TX 77036
(713) 278-0800

G. Eric Brunstad, Jr.
Counsel of Record
Rheba Rutkowski
Collin O'Connor Udell
Sukti Dhital
Jeff Goldman
Laura K. Langley
Philip B. Janis
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Fifth Circuit properly applied this Court's decisions in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), and *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), in rejecting Petitioner's assertion of sovereign immunity.

2. Whether the Court should grant certiorari to review an issue of statutory interpretation not presented, briefed, preserved, or decided in any of the courts below, namely whether section 523(a)(7) of the Bankruptcy Code, 11 U.S.C. § 523(a)(7), bars the discharge of Respondent's civil obligation to pay certain sums on account of surety bonds that Respondent executed assuring the appearance in court of certain criminal defendants.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT 3

A. Background 3

B. Decisions Below 6

REASONS FOR DENYING THE PETITION 10

A. The Decision Below Presents No Occasion For Review Of The State's Sovereign Immunity Claim 11

1. Soileau's obligation to the State is not a criminal obligation. 11

2. The discharge of Soileau's debt does not imperil the Texas criminal justice system 17

3. Principles of sovereign immunity do not bar the discharge of Soileau's debt 20

4. The Fifth Circuit's decision is not contrary to *Kelly* or *Davenport* 23

B. The Decision Below Presents No Occasion For Review Of The State's Statutory Interpretation Argument 25

1. Texas waived any section 523(a)(7) argument 25

2. Certiorari review is premature because the disagreement among the courts of appeals remains largely undeveloped 30

3. Contrary to the State's contention, *Hickman* is sound, and the statutory interpretation issue is not a matter of great public importance warranting certiorari review 31

CONCLUSION 35

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona v. Evans, 514 U.S. 1 (1995) 30

Cabrera-Benavidez v. Gonzales, 229 Fed. Appx. 323 (5th Cir. 2007) 29

California v. Taylor, 353 U.S. 553 (1957) 28

Central Pines Land Co. v. United States, 274 F.3d 881 (5th Cir. 2001) 29

Central Virginia Cmty. Coll. v. Katz, 546 U.S. 356 (2006) ..... i, 8, 9, 21, 22

City of Philadelphia v. Gi Nam (In re Gi Nam), 273 F.3d 281 (3d Cir. 2001) 30

Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004) 28

In re Cross, 666 F.2d 873 (5th Cir. 1982) 32

Dobrek v. Phelan, 419 F.3d 259 (3d Cir. 2005) 3, 30

In re Duplan, 212 F.3d 144 (2d Cir. 2000) 5

Gardner v. New Jersey, 329 U.S. 565 (1947) 21

Gleason v. Thaw, 236 U.S. 558 (1915) 33

Hickman v. State of Tex. (In re Hickman), 260 F.3d 400 (5th Cir. 2001). ..... *passim*

Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co., 126 S. Ct. 2105 (2006) 6

Hudson v. Parker, 156 U.S. 277 (1895) 16

Johnson v. Home State Bank, 501 U.S. 78 (1991) 5

Kelly v. Robinson, 479 U.S. 36 (1986) 23, 31, 32

Local Loan Co. v. Hunt, 292 U.S. 234 (1934) 20

McCray v. New York, 461 U.S. 961 (1983) 30

New York v. Irving Trust Co., 288 U.S. 329 (1933) 5, 21

Nobelman v. American Sav. Bank, 508 U.S. 324 (1993) 4

Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990) 23, 24

Perez v. Campbell, 402 U.S. 637 (1971) 21

Reynolds v. United States, 80 S. Ct. 30 (1959) 16

Stack v. Boyle, 342 U.S. 1 (1951) 16

Straton v. New, 283 U.S. 318 (1931) 6

Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004) ..... *passim*

United Sav. Ass'n v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988) 4

United States v. Clark, 226 Fed. Appx. 407 (5th Cir. 2007) 29

United States v. Florez-Zamudio, 177 Fed. Appx. 396 (5th Cir. 2006) 29

United States v. Hernandez-Gonzalez, 405 F.3d 260 (5th Cir. 2005) 29

United States v. Molina-Rodriguez, 83 Fed. Appx. 18 (5th Cir. 2003) 29

Van Huffel v. Harkelrode, 284 U.S. 225 (1931) ... 21

Virginia v. Collins (In re Collins), 173 F.3d 924 (4th Cir. 1999) 3, 30, 31

Williams v. U.S. Fidelity & Guar. Co., 236 U.S. 549 (1915) 20

Younger v. Harris, 401 U.S. 37 (1971) 24

STATE CASES

Alvarez v. State, 861 S.W.2d 878 (Tex. Crim. App. 1992) 15

Balboa v. State, 612 S.W.2d 553 (Tex. Crim. App. 1981) 17

Burns v. Harris County Bail Bond Bd., 663 S.W.2d 615 (Tex. App. 1983) 20

In re Casteneda, No. 04-04-00152-CV, 2004 WL 572355 (Tex. App. March 24, 2004) 20

Fly v. State, 550 S.W.2d 684 (Tex. Crim. App. 1977) 16

Grantham v. State, 408 S.W.2d 235 (Tex. Crim. App. 1966) 17

Jeter v. State, 26 S.W. 49 (Tex. 1894) 34

Keith v. State, 760 S.W.2d 746 (Tex. App. 1988)..... 13

Lozano v. State, 978 S.W.2d 645, 648 (Tex. App. 1998)..... 14

Marroquin v. State, 953 S.W.2d 829 (Tex. App. 1997)..... 15

Marshall v. State, 797 S.W.2d 698 (Tex. App. 1990) 13

Morin v. State, 770 S.W.2d 599 (Tex. App. 1989).... 13

Reyes v. State, 31 S.W.3d 343 (Tex. App. 2000) 12, 13, 34, 35

Rosa v. State, 958 S.W.2d 852 (Tex. App. 1997).. 16

Soileau v. State, No. 14-02-01303-CR, 2004 WL 78176 (Tex. App. Jan. 20, 2004)..... 15

State v. Maldonado, 936 S.W.2d 14 (Tex. App. 1996)..... 14

Vance v. Routt, 571 S.W.2d 903 (Tex. Crim. App. 1978)..... 34

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V..... 16

U.S. CONST. amend. VI 16

FEDERAL STATUTES, RULES & LEGISLATIVE HISTORY

11 U.S.C. § 101(5) 5
11 U.S.C. § 101(10) 4, 5
11 U.S.C. § 101(15) 4
11 U.S.C. § 101(27) 4
11 U.S.C. § 362(a) 4
11 U.S.C. § 362(b)(1) 4
11 U.S.C. § 362(b)(4) 4
11 U.S.C. § 501(a) 5
11 U.S.C. § 502(b) 5
11 U.S.C. § 523(a)(7) ..... *passim*
11 U.S.C. § 524 5
11 U.S.C. § 541(a) 4
11 U.S.C. § 726 5
11 U.S.C. § 726(a)(4) 33
11 U.S.C. § 727(a) 5
11 U.S.C. § 727(b) 5
11 U.S.C. § 727(c) 5
11 U.S.C. § 727(d) 5
FED. R. BANKR. P. 3001 5
FED. R. BANKR. P. 3002 5
FED. R. BANKR. P. 4004 5

S. Rep. No. 95-989 (1978) 33

STATE STATUTES

TEX. CODE CRIM. PROC. ANN. ch. 17 12

TEX. CODE CRIM. PROC. ANN. art. 17.01 ..... 12, 17

TEX. CODE CRIM. PROC. ANN. art. 17.02 17

TEX. CODE CRIM. PROC. ANN. art. 17.08 13

TEX. CODE CRIM. PROC. ANN. art. 17.08(6) 14

TEX. CODE CRIM. PROC. ANN. art. 17.16(a)(1) 19

TEX. CODE CRIM. PROC. ANN. ch. 22 12

TEX. CODE CRIM. PROC. ANN. art. 22.02 19

TEX. CODE CRIM. PROC. ANN. art. 22.10 ..... 14, 15

TEX. CODE CRIM. PROC. ANN. art. 22.14 .... 14, 15, 19

TEX. OCC. CODE ANN. ch. 1704 ..... 12, 17

TEX. OCC. CODE ANN. § 1704.001(1) 12, 17

TEX. OCC. CODE ANN. § 1704.001(2) 12

TEX. OCC. CODE ANN. § 1704.101(3) 13

TEX. OCC. CODE ANN. § 1704.101(6) 13

TEX. OCC. CODE ANN. § 1704.101(7) 13

TEX. OCC. CODE ANN. § 1704.102(3) 13

TEX. OCC. CODE ANN. § 1704.151 13

TEX. OCC. CODE ANN. § 1704.160 13

TEX. OCC. CODE ANN. § 1704.160(i) 13

TEX. OCC. CODE ANN. § 1704.203(a) 18

TEX. OCC. CODE ANN. § 1704.203(c) 19

TEX. OCC. CODE ANN. § 1704.204(b) 19

TEX. OCC. CODE ANN. § 1704.252(6) 20

TEX. OCC. CODE ANN. § 1704.253(b) 20

TEX. PENAL CODE ANN. chs. 1-49, 71 12

MISCELLANEOUS

Samuel Esteicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984) 30

8 TEX. JUR. 2d *Bail and Recognizance* § 87 14

PRELIMINARY STATEMENT

This matter arises out of the chapter 7 bankruptcy case of Respondent Geraldine Soileau ("Soileau"). Prior to filing for bankruptcy, Soileau was a state-licensed commercial surety who wrote bail bonds for criminal defendants. Under the terms of each bond, if the bonded defendant absconded while out on bail, Soileau would be liable to the State for the amount of the bond. Numerous defendants absconded and Petitioner, the State of Texas ("Texas"), obtained bail-bond forfeiture judgments against Soileau (the "Judgments"). Unable to pay the Judgments, Soileau commenced her chapter 7 case and sought a discharge of her debts.

Thereafter, Texas moved to dismiss Soileau's case on sovereign immunity grounds, arguing that the State's refusal to consent to the proceeding denied the bankruptcy court jurisdiction to grant a discharge of the Judgments. Critically, Texas did *not* contend that, as a matter of statutory interpretation, the Judgments were excluded from Soileau's discharge under section 523(a)(7) of the Bankruptcy Code, 11 U.S.C. § 523(a)(7). Rather, in each of the courts below, Texas argued only that the bankruptcy court lacked the authority to discharge the Judgments under principles of sovereign immunity.

The petition for writ of certiorari should be denied in its entirety. First, Soileau's failure to satisfy the Judgments is not a crime under Texas law; is not punishable as a criminal offense; and is not an obligation that accompanies any criminal sentence imposed on Soileau. Rather, the Judgments represent

a civil obligation that Soileau owes to Texas. The fact that, in Texas, bond forfeiture judgments are, for practical reasons, administered in courts that exercise criminal jurisdiction does not render the Judgments themselves criminal in nature. Accordingly, Soileau's debt is qualitatively the same as the civil student-loan obligation at issue in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). Just as the Court concluded in *Hood* that the discharge of a student-loan debt owed to a State does not run afoul of principles of sovereign immunity, the Fifth Circuit properly concluded in this case that the discharge of Soileau's debt to Texas does not run afoul of these same principles. The outcome of this case is controlled by the Court's recent decision in *Hood*, and there is no reason to revisit that decision here. Accordingly, the Court should deny certiorari on the sovereign immunity question presented by Texas.

Second, Texas never presented, briefed, or preserved in any of the courts below the argument that, as a matter of statutory interpretation, the Judgments are exempt from Soileau's discharge under section 523(a)(7) of the Bankruptcy Code. Not surprisingly, none of the courts below actually decided this question. The issue arose only because one of the judges on the Fifth Circuit panel *sua sponte* expressed the view that Soileau's discharge may not extend to the Judgments if the Fifth Circuit sitting *en banc* were to overrule its prior decision in *Hickman v. Texas (In re Hickman)*, 260 F.3d 400 (5th Cir. 2001), concluding that bail-bond forfeiture obligations are subject to discharge. *See also Virginia v.*

Collins (In re Collins), 173 F.3d 924, 931 (4th Cir. 1999) (same). Because Texas itself never made this statutory interpretation argument or challenged *Hickman*'s holding on this point, Texas waived the argument and is not entitled to relief on account of it. Accordingly, the issue is not presented properly for review and the Court should deny certiorari on the statutory interpretation question presented by Texas.

Even if Texas had properly preserved the statutory interpretation argument it offers here, certiorari would still not be warranted. Although the Fifth Circuit's decision in *Hickman* is contrary to the Third Circuit's decision in *Dobrek v. Phelan (In re Dobrek)*, 419 F.3d 259 (3d Cir. 2005), the disagreement among the circuit courts is not widespread and remains largely undeveloped. Further, the decision below does not conflict with prior precedents of this Court. Nor does it present a matter of pressing public importance requiring this Court's intervention. Rather, it involves merely an arcane issue of bankruptcy law that arises rarely. Accordingly, certiorari should be denied.

STATEMENT

A. Background

Soileau conducted her business as a commercial surety authorized to issue bail bonds from 1997 until late 2003. After numerous defendants for whom Soileau had issued bail bonds absconded, Texas obtained the Judgments against her totaling $650,897.71. Pet. App. 2. Unable to pay this debt,

Soileau commenced her bankruptcy case on March 26, 2004 seeking a discharge of her monetary obligations, including the Judgments. *Id.* 33.

When a debtor commences a bankruptcy case, a bankruptcy estate is formed, consisting of all the debtor's interests in property of every kind, wherever located. 11 U.S.C. § 541(a). The automatic stay applies, preventing creditors[1] from taking actions against estate property, or otherwise dismantling the estate. 11 U.S.C. § 362(a); *see Nobelman v. American Sav. Bank*, 508 U.S. 324, 330 (1993); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 369 (1988). The stay contains an exception for the commencement or continuation of a criminal action against the debtor, 11 U.S.C. § 362(b)(1), and for a governmental unit's exercise of its police and regulatory powers, but expressly provides that this exception does not apply to the enforcement of money judgments or related enforcement activities, 11 U.S.C. § 362(b)(4). Thus, a governmental unit may not take advantage of the regulatory exception to require a debtor to pay a pre-existing monetary liability or to transfer assets for that purpose.

By operation of law, creditors' rights to payment against the debtor constitute "claims" against the es-

---

[1] A "creditor" is any "entity" that has a claim against the debtor. 11 U.S.C. § 101(10). The term "entity" specifically includes "government unit," 11 U.S.C. § 101(15), and the term "governmental unit" specifically includes both a "State" and any "department, agency, or instrumentality of . . . a State," 11 U.S.C. § 101(27).

tate. 11 U.S.C. §§ 101(5), 502(b). Creditors holding pre-petition claims, including unsecured creditors such as Texas here, may file a "proof of claim" with the bankruptcy court. 11 U.S.C. §§ 101(10), 501(a); FED. R. BANKR. P. 3001, 3002. Creditors filing proofs of claim may be entitled to distributions (to the extent available) from the proceeds collected from the liquidation of the assets of the estate. 11 U.S.C. § 726. In general, only creditors, including governmental units, that file proofs of claim are entitled to distributions. *Id.*; *see* FED. R. BANKR. P. 3002(a); *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933).

After commencing a chapter 7 case, the debtor receives a discharge unless a party in interest, including a creditor, objects. 11 U.S.C. §§ 727(c), (d). In a chapter 7 case, the grounds for objecting to the debtor's discharge are set forth in section 727(a). *See also* FED. R. BANKR. P. 4004. Absent objection, the effect of section 727 is to release the debtor from personal liability for most pre-petition monetary obligations. 11 U.S.C. § 727(b); *see also* 11 U.S.C. § 524; *Johnson v. Home State Bank*, 501 U.S. 78, 84 n.5 (1991). The discharge applies whether or not the creditor has filed a proof of claim. *In re Duplan*, 212 F.3d 144, 154 (2d Cir. 2000). Further, "States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less then other creditors." *Hood*, 541 U.S. at 448. Notably, the scope of the discharge is subject to exceptions for certain kinds of debts, as set forth in section 523(a) of the Code.

In all respects relevant here, proceedings in bankruptcy are fundamentally proceedings *in rem*. *Straton v. New*, 283 U.S. 318, 320-21 (1931); *see also Hood*, 541 U.S. at 448 (discussing the bankruptcy court's *in rem* jurisdiction). The *in rem* nature of the proceedings extends to the critical bankruptcy function of marshalling an insolvent debtor's assets, and the adjustment and payment of claims from those assets. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 126 S. Ct. 2105, 2116 (2006) ("we are guided in reaching our decision by the equal distribution objective underlying the Bankruptcy Code); *Straton*, 283 U.S. at 320-21 ("The purpose of the Bankruptcy Act . . . is to place the property of the bankruptcy [*sic*], wherever found, under the control of the court, for equal distribution among creditors."). It likewise extends to the critical bankruptcy function of granting a discharge of the debtor's debts. *Hood*, 541 U.S. at 447 ("The discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding.").

Ignoring proper procedure, Texas failed to file a proof of claim and did not object or otherwise contest the discharge of the Judgments under sections 727 or 523 of the Code. Instead, Texas moved to dismiss Soileau's bankruptcy case, and asked to be dismissed as a party to the bankruptcy proceeding, alleging sovereign immunity under the Eleventh Amendment. Pet. App. 2.

B. Decisions Below

On August 18, 2004, the bankruptcy court denied the State's motion to dismiss Soileau's case. Pet. App. 33. Noting that the Court's decision in *Hood*

"held that the Bankruptcy Court's discharge of a student loan debt does not implicate a State's Eleventh Amendment immunity," the court reasoned that Soileau's obligation to Texas under the Judgments was qualitatively the same as the civil debt involved in *Hood*, and correspondingly rejected the State's argument that Soileau's debt was criminal in nature:

> The State is essentially conducting credit transactions – risky credit transactions at that – given that Texas permits a bail bond license holder to execute bail bonds in an aggregate amount of up to ten times the value of the property held as security. Accordingly, Texas could avoid the issue presented in this case by improving its credit determinations.
>
> . . . .
>
> Texas may choose to administer its bail bond system in the manner that it sees fit. However, this choice [to administer the bail-bond system through its criminal courts] does not alter the essential characteristics identified by the Fifth Circuit [requiring the conclusion that Soileau's debt is civil and contractual in nature]. The Debtor in this case is not the accused in a criminal case; the Debtor was authorized by Texas to assure the accused's appearance. While the accused's liberty is at stake in a bond forfeiture proceeding, a person issuing a bail bond is only subject to a financial forfeiture. For rather obvious reasons, it is more efficient for Texas to administer its bond forfeitures through the criminal system.

> Despite this efficiency, the forfeiture process is a contractual one. Texas is free to change its bond licensing procedures to eliminate Texas's credit risk. However, bankruptcy laws deal with the failure of credit risks. So long as Texas elects to take a credit risk, there is no reason that its credit decisions should not be subject to the uniform laws on bankruptcy adopted by Congress.

Pet. App. 35-36.

On appeal, the district court affirmed on essentially the same grounds. Pet. App. 30-32. On further appeal, the Fifth Circuit also affirmed. *Id.* 22-23. The court of appeals began by emphasizing that denial of the State's motion to dismiss Soileau's bankruptcy case "was compelled by *Hood* alone" and that "consideration of our earlier decision in [*Hickman*, 260 F.3d 400] was wholly unnecessary." *Id.* at 2-3 n.3. The court concluded:

> Whatever uncertainty there may be as to the outer limits of the holdings of [*Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356 (2006), concluding that principles of sovereign immunity do not prohibit a trustee in bankruptcy from recovering a preferential payment from a State,] and *Hood*, at the very least they together establish beyond cavil that an *in rem* bankruptcy proceeding brought merely to obtain the discharge of a debt or debts by determining the rights of various creditors in a debtor's estate – such as is brought here – in no way infringes the sovereignty of a state as a

> creditor. . . . In this case, the State challenges the *in rem* discharge of a debt, a specie of imposition on the states' sovereignty undeniably countenanced by *Katz* and *Hood*.

Pet. App. 9-10.

With the only question presented on appeal thus resolved (*i.e.*, whether the bankruptcy court should have dismissed Soileau's bankruptcy case on grounds of sovereign immunity), the opinion would have concluded but for the concurrence of Chief Judge Jones, who discussed *sua sponte* whether Soileau's debt to the State might be exempt from discharge under section 523(a)(7) of the Bankruptcy Code. Conceding that *Hood* and *Katz* "dispose[d] of any Eleventh Amendment sovereign immunity claim that Texas could raise here," Judge Jones nevertheless urged *en banc* review to overrule *Hickman*. Pet. App. 23-29. Noting that "this case is not the appropriate vehicle for a reexamination of *Hickman's* holding" because Texas had not presented its statutory interpretation arguments below, *id.* 14, the two other judges on the panel also discussed *Hickman* in response to Chief Judge Jones' concurrence and, thus, the question whether section 532(a)(7) bars discharge of bail-bond forfeitures, but did so solely to explain their disagreement with Chief Judge Jones' suggestion of *en banc* review. *Id.* 16-22. Judges Prado and Weiner expressly emphasized that this discussion was dicta. *Id.* 15. Thereafter, the Fifth Circuit denied the State's petition for rehearing and suggestion for rehearing en banc. *Id.* 38-39.

REASONS FOR DENYING THE PETITION

The decision below presents no occasion for certiorari review. First, Texas asserts that Soileau's obligation is criminal in nature, and therefore distinguishable from the student-loan debt at issue in *Hood*. It contends that, whatever the reach of *Hood*, principles of sovereign immunity deny a federal court jurisdiction to discharge a criminal obligation. Texas is wrong. Regardless of how Texas labels Soileau's debt for purposes of this litigation, it is not criminal in nature, and Soileau's obligation is qualitatively the same as the debtor's student-loan obligation in *Hood*. Moreover, even if this were not so, there is no reason to grant certiorari. No disagreement exists among the courts of appeals on the sovereign immunity issue presented here. Likewise, the decision below does not conflict with any prior decision of this Court. Nor does it involve any matter of pressing public importance requiring this Court's intervention. Contrary to the State's assertion, the discharge of obligations such as Soileau's in this case has not imperiled its criminal justice system. Accordingly, the Court should deny certiorari on the sovereign immunity question presented by Texas.

Second, Texas contends that, under section 523(a)(7) of the Bankruptcy Code, Soileau's debt is exempted from discharge as a "forfeiture" obligation. But Texas failed to present, brief, or preserve this argument below, and none of the courts below actually decided it. Accordingly, the State's statutory construction argument is not properly presented for review. Moreover, even if this were not so, the dis-

agreement among the courts of appeals on this issue remains largely undeveloped. Likewise, the decision below does not conflict with any prior decision of this Court. Nor does it present an issue of pressing public importance. Accordingly, the Court should deny certiorari on the statutory interpretation question presented by Texas.

A. The Decision Below Presents No Occasion For Review Of The State's Sovereign Immunity Claim.

Texas presented one question below: whether principles of sovereign immunity denied the bankruptcy court jurisdiction to discharge the bail-bond forfeiture Judgments that Texas holds against Soileau. Pet. App. 3. As noted, all three lower courts concluded that the answer to this question is no. This result is manifestly correct and there is no warrant for further review by this Court.

1. Soileau's obligation to the State is not a criminal obligation.

In *Hood*, the Court concluded that principles of sovereign immunity do not bar the discharge of a student-loan obligation owed to a State. Attempting to distance itself from *Hood*, Texas argues that Soileau's obligation is different because it is criminal in nature. Texas contends that, whatever the reach of *Hood*, principles of sovereign immunity bar the discharge in bankruptcy of a criminal debt. Texas is mistaken. Soileau's debt is not criminal in nature, and this case is indistinguishable from *Hood*.

In Texas, laws governing bail, bail forfeiture, and bail-bond sureties are set forth in the Code of Criminal Procedure and the Occupations Code. *See* TEX. CODE CRIM. PROC. ANN. chs. 17, 22 (Vernon 2007); TEX. OCC. CODE ch. 1704 (Vernon 2007). In contrast, laws regarding crimes and punishments are contained within the Penal Code. *See* TEX. PENAL CODE ANN. chs. 1-49, 71 (Vernon 2007). At bottom, a bail-bond forfeiture obligation is a unique type of debt – the *obligation* is civil and contractual, but the *proceeding* in which it is enforced is criminal because the contract is related to a criminal defendant. *Reyes v. State*, 31 S.W.3d 343, 345 (Tex. App. 2000). Under Texas law, Soileau's failure to pay the bail-bond Judgments is not a crime, and her debt properly constitutes a civil, rather than a criminal, liability.

As Texas courts have recognized, a bail bond is a contract between the surety and the State.[2] *Reyes,*

---

[2] "'Bail' is the security given by the accused that he will appear and answer before the proper court the accusation brought against him, and includes a bail bond or a personal bond." TEX. CODE CRIM. PROC. ANN. art. 17.01 (Vernon 2007). A "[b]ail bond surety" is one who "(A) executes a bail bond as a surety or co-surety for another person; or (B) for compensation deposits cash to ensure the appearance in court of a person accused of a crime." TEX. OCC. CODE ANN. § 1704.001(2) (Vernon 2007). A "[b]ail bond" is defined as "a cash deposit, or similar deposit or written undertaking, or a bond or other security, given to guarantee the appearance of a defendant in a criminal case." TEX. OCC. CODE ANN. § 1704.001(1). Commercial bail-bond sureties in Texas are statutorily regulated by a detailed licensing scheme. *See generally* TEX. OCC. CODE ANN. ch. 1704. County

31 S.W.3d at 345 (holding that "[b]ail bonds are contracts between the surety and the state"); *Morin v. State*, 770 S.W.2d 599, 599 (Tex. App. 1989); *Keith v. State*, 760 S.W.2d 746, 747 (Tex. App. 1988), *aff'd*, 802 S.W.2d 690 (Tex. Crim. App. 1990) (bail bond "is a contract between Keith, as a surety, and the State"); *Marshall v. State*, 797 S.W.2d 698, 702 (Tex. App. 1990).

Among other things, a bail bond must state "[t]hat it be made payable to 'The State of Texas'; . . . [t]hat the defendant and his sureties, if any, bind themselves that the defendant will appear [and] . . . [t]hat the bond be signed by name or mark by the principal and sureties." TEX. CODE CRIM. PROC. ANN. art. 17.08. Bail bonds must provide "that the princi-

---

bail-bond boards are charged with the duty of enforcing Chapter 1704 of the Occupations Code and, *inter alia*, "shall . . . supervise and regulate each phase of the bonding business in the county," issue or deny licenses to applicants, and "suspend or revoke a license for a violation of this chapter." TEX. OCC. CODE ANN. §§ 1704.101(3), 1704.101(6)-(7), 1704.102(3). With the exception of attorneys serving as sureties for their clients, "a person may not act as a bail bond surety or as an agent for a corporate surety in the county unless the person holds a license." TEX. OCC. CODE ANN. § 1704.151. Financial eligibility requirements for licensure are extensive. After conditional approval of one's license application, the applicant must "deposit with the country treasurer a cashier's check, certificate of deposit, or cash" in the amount of $50,000, or execute in trust to the county bail board deeds for real property appraised at a minimum of $50,000. TEX. OCC. CODE ANN. § 1704.160. The requisite security must be maintained so long as the individual holds a license. TEX. OCC. CODE ANN. § 1704.160(i).

pal and sureties, if any, will pay all necessary and reasonable expenses incurred by any and all sheriffs or other peace officers in rearresting the principal in the event he fails to appear." TEX. CODE CRIM. PROC. ANN. art. 17.08(6).

Once "a forfeiture has been declared upon a bond, the court or clerk shall docket the case upon the scire facias or *upon the civil docket*, in the name of the State of Texas, as plaintiff, and the principal and his sureties, if any, as defendants." TEX. CODE CRIM. PROC. ANN. art. 22.10 (emphasis supplied). Moreover, "[w]hen, upon a trial of the issues presented, no sufficient cause is shown for the failure of the principal to appear, the judgment shall be made final against him and his sureties, if any, for the amount in which they are respectively bound; and the same shall be collected by execution *as in civil actions*." TEX. CODE CRIM. PROC. ANN. art. 22.14 (emphasis supplied). The statute requires that judgment be entered against both the principal (the criminal defendant) and any sureties (here, Soileau); judgment cannot be entered only against a surety. *Lozano v. State*, 978 S.W.2d 645, 648 (Tex. App. 1998) ("A final judgment must be rendered as to the sureties and the principal. The whole matter in controversy must be finally disposed of as to all parties.") (quoting 8 TEX. JUR. 2d *Bail and Recognizance* § 87).

In this case, the State makes much of the fact that bond-forfeiture judgments fall within the *jurisdiction* of the Texas criminal courts. *E.g., State v. Maldonado*, 936 S.W.2d 14, 16 (Tex. App. 1996) (noting that bond forfeiture *proceedings* are criminal in

nature). But what is at issue here is the nature of Soileau's *obligation*, not the proper characterization of the general jurisdiction of the court that enforces it. Because the decisions that Texas cites characterize the jurisdiction of the enforcing court, rather than the nature of the obligation itself, these cases provide no real authority that Soileau's debt is criminal in nature. On the contrary, careful review of Texas law reveals that Soileau's debt is plainly a civil obligation. Because it is a civil debt, it is qualitatively indistinguishable from the civil student-loan debt at issue in *Hood*.

Under Texas law, a bond-forfeiture proceeding "shall be governed by the same rules governing other civil suits." TEX. CODE CRIM. PROC. ANN. art. 22.10. Thus, the rules of civil discovery apply to such proceedings. *Soileau v. State*, No. 14-02-01303-CR, 2004 WL 78176 at *2, 7 (Tex. App. Jan. 20, 2004). And unlike the statutes contained in the Penal Code governing crimes, the Criminal Procedure Code does not provide punishment for a forfeiting surety. Instead, the amount owed by the surety is simply "collected by execution as in civil actions." TEX. CODE CRIM. PROC. ANN. art. 22.14. Even more telling, bail-bond forfeiture cases may be disposed of on summary judgment. *See, e.g., Marroquin v. State*, 953 S.W.2d 829, 830 (Tex. App. 1997) (affirming grant of summary judgment for the State in bail-bond forfeiture proceeding); *Alvarez v. State*, 861 S.W.2d 878, 889 (Tex. Crim. App. 1992) (reversing grant of summary judgment for State where genuine issues of material fact existed regarding whether criminal defendant had received proper notice that his appearance was

required). Disposition of a criminal matter in favor of the State on summary judgment would, of course, raise grave constitutional concerns. *See* U.S. CONST. amend. V (prohibiting deprivation of "life, liberty or property without due process of law"); U.S. CONST. amend. VI (providing right to trial by jury). Clearly, Soileau's failure to pay the Judgments is not a crime under Texas law.

Furthermore, as a matter of common sense, a surety does not stand in the shoes of the criminal defendant whose appearance she guarantees. *Cf. Rosas v. State*, 958 S.W.2d 852, 853 (Tex. App. 1997) ("It is a venerable principle that there is no error in adjudging a surety liable on an appearance bond when the State has dismissed the principal cognizor from the proceeding."). And it is well settled in general that, rather than imposing punishment, bail bonds are designed simply to guarantee a defendant's appearance at trial. *See, e.g., Reynolds v. United States*, 80 S. Ct. 30, 32 (1959) (Douglas, J., in chambers) ("The purpose of bail is to insure the defendant's appearance and submission to the judgment of the court."); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."); *Hudson v. Parker*, 156 U.S. 277, 285 (1895) ("The only 'proper security,' then, in a criminal case, is security for the appearance of a prisoner admitted to bail."); *Fly v. State*, 550 S.W.2d 684, 685 (Tex. Crim. App. 1977) (the primary purpose of a bond is to secure the defendant's presence at trial).

Texas itself defines bail as "security," TEX. CODE CRIM. PROC. ANN. art. 17.01, and terms a bail bond to be "a written undertaking," *id.* art. 17.02; TEX. OCC. CODE ANN. § 1704.001(1); *see also Balboa v. State*, 612 S.W.2d 553, 557 n.2 (Tex. Crim. App. 1981) (Clinton, J., concurring in part, dissenting in part) (holding that the purpose of bail is to secure a defendant's presence at trial, and that "[i]t is not a revenue measure intended to be a substitution for a fine, but is intended to secure the trial of the alleged offender rather than turn his securities or those of his bondsman into a penalty") (quotation omitted); *Grantham v. State*, 408 S.W.2d 235, 236 (Tex. Crim. App. 1966) ("Bail is not a revenue measure intended to be a substitution for a fine but is intended to secure the trial of the offender rather than to mulct his securities in a penalty.") (quotation omitted). Given that bail bonds serve no penal purpose, it cannot be true that Soileau's failure to pay the Judgments – in essence her failure as a surety to pay amounts that a criminal defendant owes as bail – is punishable as a penal offense. The State's argument that Soileau's debt is a criminal obligation thus fails.

2. **The discharge of Soileau's debt does not imperil the Texas criminal justice system.**

The State's assertion that the discharge of bail-bond forfeiture judgments in bankruptcy would devastate its criminal justice system is also wholly without merit. In Texas, commercial bail-bonding is a business. *See generally* TEX. OCC. CODE ANN. ch. 1704. Soileau engaged in this business unsuccessfully. Currently, Soileau is insolvent, disabled, lives

on social security disability benefits, and cannot possibly pay the Judgments.

As the courts below recognized, the problem with the State's bail-bond scheme is that Texas allows bail-bond sureties to write bonds in aggregate amounts that far exceed their net worth. Specifically, the Occupations Code currently permits a surety to execute bail bonds in an amount at least ten times "the value of the security deposited or executed by the license holder." TEX. OCC. CODE ANN. § 1704.203(a). In other words, the State allows bail-bond sureties to write bonds on their own credit. Inevitably, some sureties will default, and the State takes this risk. The State thus cannot be heard to complain that its criminal justice system teeters on the brink of failure owing to the very risk that the State itself assumes by permitting sureties to write bail bonds on their own credit. If Texas wishes to benefit from the bail-bond business while minimizing its exposure to the credit risk the business generates – including the possibility that sureties' debts will be discharged in bankruptcy – it is wholly within its power to do so, such as demanding adequate security or insurance to avoid any loss.

Further, the State's assertion that its criminal justice system faces ruin is vastly overblown. As the Fifth Circuit noted, bail-bond forfeiture judgments have long been the subject of discharge in bankruptcy and the State has suffered no demonstrable harm as a result, Pet. App. 21, let alone teetered on the verge of collapse.

Contrary to the State's contentions, the discharge of a surety's debt in bankruptcy cannot "invalidate[]" criminal proceedings. Pet. 17. By the time a forfeiture judgment enters, the criminal defendant has already failed to appear. TEX. CODE CRIM. PROC. ANN. art. 22.02. Thus, discharge of the surety's debt cannot be asserted as the cause of the defendant's nonappearance. Moreover, forfeiture judgments are entered against both the defendant and the surety, *see* TEX. CODE CRIM. PROC. ANN. art. 22.02, 22.14, and thus discharge of the surety's obligation does not impact the defendant's liability on the forfeiture judgment or the underlying criminal offense. Nor does discharge of the surety's debt hinder the penal or rehabilitative goals of the State's criminal justice system, of which the criminal defendant, not the surety, is the subject.

Further, the statutory scheme requires suspension or revocation of the licenses of sureties who fail to pay judgments entered against them, *see* TEX. CODE CRIM. PROC. ANN. art. 22.02, 22.14, providing a clear incentive for sureties to produce defendants or pay the forfeiture judgment resulting from the failure to do so. A surety can avoid forfeiture by "surrendering the accused into the custody of the sheriff of the county where the prosecution is pending." *Id.* art. 17.16(a)(1). If she does not produce the defendant and fails to satisfy the bail-bond debts entered against her, she forfeits the security posted to obtain her license, and may be prevented from executing additional bail bonds. TEX. OCC. CODE ANN. §§ 1704.203(c), 1704.204(b). Failure to pay such debts results in mandatory revocation of a surety's

license, and thus a loss of her livelihood. *Id.* § 1704.253(b); *see In re Casteneda*, No. 04-04-00152-CV, 2004 WL 572355, at *1 (Tex. App. March 24, 2004); *Burns v. Harris County Bail Bond Bd.*, 663 S.W.2d 615, 616 (Tex. App. 1983). That a surety's license may be suspended or revoked if she "is found by a court to be bankrupt or is insolvent," TEX. OCC. CODE ANN. § 1704.252(6), provides yet another incentive for sureties to produce criminal defendants for trial, pay forfeiture judgments entered against them, and avoid bankruptcy.

Bail-bond sureties have every incentive to perform their obligations. Inevitably, however, some will become insolvent and fail. That does not mean that their obligations should be treated as criminal liabilities excepted from discharge where, as here, applicable state law does not render a surety's failure to satisfy its bail-bond obligation a criminal offense.

3. Principles of sovereign immunity do not bar the discharge of Soileau's debt.

The Court has repeatedly acknowledged that a primary purpose of bankruptcy law is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (quoting *Williams v. U.S. Fidelity & Guar. Co.*, 236 U.S. 549, 554-55 (1915)). In *Hood*, the Court recognized that bankruptcy courts are able to fulfill this crucial bankruptcy policy through the grant of a discharge, whether or not all creditors choose to participate in the proceedings, *be-*

cause the bankruptcy court's jurisdiction is *in rem*. *Hood*, 541 U.S. at 448 ("A bankruptcy court's *in rem* jurisdiction permits it to determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is one against the world.") (internal quotation marks and citations omitted).

This essential purpose of bankruptcy law cannot be fulfilled unless all interested parties, including those cloaked in the mantle of sovereign immunity, are subject to the jurisdiction of the bankruptcy court and bound by its orders, irrespective of their consent, because otherwise bankruptcy's collective mechanism for resolution could not operate. *Irving Trust*, 288 U.S. at 333. Thus, as the Court explained in *Hood*, longstanding precedent holds that "States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors." 541 U.S. at 448 (citing *Irving Trust*, 288 U.S. at 333; *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947); *Van Huffel v. Harkelrode*, 284 U.S. 225, 228-229 (1931)). *See Perez v. Campbell*, 402 U.S. 637, 656 (1971). So, too, the Court has "previously endorsed individualized determinations of States' interests within the federal courts' *in rem* jurisdiction." *Hood*, 541 U.S. at 450 (citing, *inter alia*, *Gardner*, 329 U.S. at 572-574; *Van Huffel*, 284 U.S. at 228).

These principles compel the conclusion that concepts of sovereign immunity do not bar the discharge of Soileau's debt in this case. This conclusion is further reinforced by the Court's analysis in *Katz*, in

which the Court reaffirmed the principles discussed above, including that "[b]ankruptcy jurisdiction, at its core, is *in rem*," and "does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." 546 U.S. at 362, 369-70 (collecting cases). The Court explained that "[t]he history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena." 546 U.S. at 362-63. The Court emphasized that "the interest in avoiding unjust imprisonment for debt and making federal discharges in bankruptcy *enforceable in every State* was a primary motivation for the adoption of" the Bankruptcy Clause, and that Congress's power thereunder to establish "uniform Laws on the subject of Bankruptcies throughout the United States" is a "unitary concept" encompassing the entire "subject of Bankruptcies," which the Framers would have understood to include "laws providing, in certain limited respects, for more than simple adjudications of rights in the *res*." *Id.* at 370 (emphasis supplied).

If, as the Court stated in *Katz*, Congress has the constitutional authority to release a debtor imprisoned for debt, *id.* at 374-75, Congress has the constitutional authority to discharge a civil obligation such as Soileau's debt in this case. This matter falls squarely within the scope of the Court's existing

precedents; the court below properly applied those precedents; and there is no reason for the Court to review the State's claim of sovereign immunity.

4. **The Fifth Circuit's decision is not contrary to *Kelly* or *Davenport*.**

Texas suggests that the decision below is contrary to *Kelly v. Robinson*, 479 U.S. 36 (1986). Pet. 12, 15. Not so. First, *Kelly* is not a sovereign immunity case. Second, *Kelly* is factually distinguishable. Third, both *Kelly* and its companion case, *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 560-63 (1990), actually support the Fifth Circuit's conclusion because both decisions assume that a bankruptcy court may discharge debts that are criminal in nature notwithstanding sovereignty concerns.

Kelly considered whether section 523(a)(7) excepted from discharge an obligation that "a state criminal court impose[d] *as part of a criminal sentence*." 479 U.S. at 50 (emphasis supplied). Explaining that "Section 523(a)(7) protects traditional criminal fines," *Kelly*, 479 U.S. at 51, the Court concluded that the criminal-restitution obligation at issue could not be discharged in a chapter 7 proceeding. In this case, of course, Soileau's obligation was not imposed as part of a criminal sentence and is not a fine. Moreover, implicit in the Court's analysis in *Kelly* is the principle that Congress has the *authority* to discharge criminal obligations; the question is simply whether Congress has intended to do so in the Bankruptcy Code.

In *Davenport*, the Court discussed whether debtors may discharge criminal-restitution obligations in chapter 13 cases. In contrast to its holding in *Kelly*, the Court concluded that they may do so owing to the then-broader nature of a chapter 13 discharge. (Congress subsequently narrowed the chapter 13 discharge to preclude such a discharge.) Although *Davenport* was not expressly a case about sovereign immunity, the Court reached its conclusion after considering various sovereignty and comity concerns. The central tension between the majority and dissenting opinions in *Davenport* was the level of clarity required of the statutory text before the Court would conclude that Congress intended to allow a chapter 13 discharge of criminal-restitution payments, which payments were elements of criminal sentences. The majority determined that Congress had made its intent sufficiently clear.

Critically, no justice dissented from *Davenport's* holding that Congress had the authority to discharge a state-imposed criminal monetary penalty. As the Court stated, "the concerns animating *Younger [v. Harris*, 401 U.S. 37, 41, 43 (1971)]" – *i.e.*, reflecting the federal courts' traditional reluctance to exercise jurisdiction where a federal-court pronouncement would disrupt a state-court prosecution – "cannot justify rewriting the Code to avoid federal intrusion." 495 U.S. at 564. The decision below is contrary to neither *Kelly* nor *Davenport*. Indeed, it faithfully follows both precedents.

B. The Decision Below Presents No Occasion For Review Of The State's Statutory Interpretation Argument.

1. Texas waived any section 523(a)(7) argument.

Until now, Texas never pursued a challenge to the dischargeability of the Judgments on the basis of its interpretation of section 523(a)(7) of the Bankruptcy Code. Pet. App. 4 n.5 ("[T]he State did not argue, either before us or to the lower courts, that Soileau's debt should be nondischargeable by virtue of § 523(a)(7) of the Bankruptcy Code."); *see also id.* 14 ("[T]he State has not advanced . . . a 'nondischargeability claim.' Rather, the only legal theory asserted by the State both today and before the lower courts is Eleventh Amendment sovereign immunity."); *id.* (noting that Texas stated in its motion that "the present case claims sovereign immunity" and that Texas did not "*even raise an issue concerning the dischargeability of Soileau's criminal bail bond forfeiture judgments*"); *id.* (observing that Texas asserted at oral argument that "this case is not concerned directly with the issue of whether the Fifth Circuit's decision [in Hickman] is accurate").

Moreover, after reviewing the record, the court below expressly explained that Texas and each of the lower courts discussed *Hickman* "only in the context of determining whether . . . discharge in the instant case would offend the State's sovereign immunity, not whether the debt was dischargeable *vel non*." Pet App. 15. The court thus concluded that "this

case is not the appropriate vehicle for a reexamination of *Hickman's* holding." *Id.* 14.

The question whether *Hickman* correctly held that section 523(a)(7) does not bar from discharge bond-forfeiture judgments against sureties arose in this case *only* as a result of the concurrence below of Chief Judge Jones urging review *en banc* to overrule *Hickman*. Pet App. 23-29. As noted, the majority discussed *Hickman's* analysis of the dischargeability of bail-bond forfeitures only to the extent necessary to explain its disagreement with the suggestion for *en banc* review, *id.* 16-22, and emphasized that its discussion was dicta, *id.* 15 ("As the issue of dischargeability was never raised, we limit our holding to the issue before us – whether discharge of Soileau's debt impermissibly infringes on the State's sovereign immunity.").

As the majority noted, Texas failed to brief the statutory dischargeability question, and criticized *Hickman* only in the context of arguing that the bankruptcy court lacked jurisdiction to take *any* action concerning the Judgments because bail-bond forfeiture judgments are governed by the criminal justice system and are penal in nature, and any attempt by the bankruptcy court to "alter, cancel, discharge, or otherwise consider these judgments would be an affront to the sovereignty of the State of Texas." Pet'r U.S.B.C. Br. 11. The State's criticism of *Hickman* did not concern *Hickman's* interpretation of section 523(a)(7), but rather *Hickman's* conclusion that the relationship between a bail-bond surety and the

State is contractual in nature, rather than penal. *Id.* 5-8.

Texas made the same point in its district court brief, where it bluntly criticized the bankruptcy court for even mentioning *Hickman*. *See* Pet'r U.S.D.C. Br. 4. ("Rather than discuss sovereign immunity claimed by the State, [the bankruptcy court] refers to *Hickman* . . . which involves an entirely different issue concerning whether debts arising from bail bond forfeitures are dischargeable in bankruptcy."); *id.* at 13 ("*Hickman* does not even consider a claim for sovereign immunity because in *Hickman* the State filed a claim with the Bankruptcy Court thereby waiving its right to claim sovereign immunity. Most importantly, Hickman and Section 523(a)(7) are irrelevant to an issue involving a claim for sovereign immunity.").

The State's brief filed in the Fifth Circuit similarly complains that both lower courts "fail[ed] to distinguish and apply the State's claim of sovereign immunity from the question of dischargeability of debt with both courts relying on the *In re Hickman* case, which case did not even involve a sovereign immunity issue." Pet'r Fifth Cir. Br. 5. More important, Texas expressly disavowed presenting any claim based on section 523(a)(7). Specifically, it insisted that "[t]he State's Motion [to dismiss Soileau's bankruptcy case] claims sovereign immunity. The State does not even raise an issue concerning the dischargeability of Soileau's criminal bail bond forfeiture judgments, and dischargeability was the only issue raised and resolved in *In re Hickman*." *Id.*; *see*

also id. at 9 ("Rather than discuss sovereign immunity as claimed by the State, the bankruptcy court's opinion refers instead to *In re Hickman*, . . . which involves an entirely different issue. Notably[,] *In re Hickman* is concerned with whether debts arising from bail bond forfeitures are dischargeable in bankruptcy, which is clearly distinguishable from the State's present claim for sovereign immunity."). Consistent with its other briefs, the State's reference in its reply brief to the dischargeability issue in *Hickman* also concerns its argument that, contrary to *Hickman*, bail-bond forfeiture judgments are criminal in nature and, therefore, Texas should be able to claim sovereign immunity because such judgments are an "integral and essential tool in the administration of the State's criminal justice system." Pet'r Fifth Cir. Reply Br. 3-5, 8; *see also* Pet. App. 15 n.36.

Based on its own submissions, Texas failed to present, brief, or preserve any claim under section 523(a)(7) and thus waived any such claim. *E.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 169-70 (2004) (deeming issue not briefed to be waived, stating that "[w]e ordinarily do not decide in the first instance issues not decided below" and that "we are not prepared . . . to resolve the [] question solely on the basis of dictum"); *California v. Taylor*, 353 U.S. 553, 557 (1957) ("The Court of Appeals, however, held that this contention had been waived because it was not briefed there by the State and not mentioned in the State's oral argument. We, accordingly, do not recognize this contention here.").

Texas attempts to avoid its waiver by arguing that it "was prevented from" raising it by the Fifth Circuit rule that "one panel of the Court may not overrule another." Pet. 6-7 (quoting *Central Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001)). This contention is both disingenuous and erroneous, given the State's repeated admonitions to the lower courts that it made no dischargeability argument, and its criticism of the lower courts for even mentioning *Hickman*. More important, Texas was *required* to raise the issue in order to preserve it for review. *E.g.*, *United States v. Hernandez-Gonzalez*, 405 F.3d 260, 261-62 (5th Cir. 2005) (only "extraordinary circumstances" excuse a party from raising an issue before the panel in order to preserve it for rehearing or *en banc* review). In the Fifth Circuit (as elsewhere), parties must do so to preserve issues, contrary circuit precedent notwithstanding. *E.g.*, *Cabrera-Benavidez v. Gonzales*, 229 Fed. Appx. 323, 323 (5th Cir. 2007); *United States v. Clark*, 226 Fed. Appx. 407, 409 (5th Cir. 2007); *United States v. Florez-Zamudio*, 177 Fed. Appx. 396, 397 (5th Cir. 2006); *United States v. Molina-Rodriguez*, 83 Fed. Appx. 18 (5th Cir. 2003).

The State's waiver below of its statutory construction argument renders it inappropriate for review in this Court. Accordingly, the Court should deny certiorari on this question.

2. Certiorari review is premature because the disagreement among the courts of appeals remains largely undeveloped.

Texas contends that certiorari review of the statutory interpretation issue is warranted because of the existence of a circuit split on the question. The Fourth and Fifth Circuits agree that bail-bond forfeitures are not penal obligations that fall within the scope of section 523(a)(7). *E.g., Hickman*, 260 F.3d at 407; *Collins*, 173 F.3d at 926. In contrast, the Third Circuit takes a different view. *Dobrek*, 419 F.3d 259; *City of Philadelphia v. Gi Nam (In re Gi Nam)*, 273 F.3d 281 (3d Cir. 2001). The disagreement, however, is neither widespread among the courts of appeals nor particularly well-developed. Accordingly, even if the State had not waived its argument, certiorari would be premature. *See Arizona v. Evans*, 514 U.S. 1, 25 n.1 (1995) (Ginsburg, J., dissenting) (citing *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various [lower courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court."); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 716 (1984) (stating that this approach permits "independent evaluation of a legal issue by different courts [and] a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule").

3. Contrary to the State's contention, *Hickman* is sound, and the statutory interpretation issue is not a matter of great public importance warranting certiorari review.

In *Hickman*, the Fifth Circuit held that section 523(a)(7) "excludes from discharge only those forfeitures imposed because of misconduct or wrongdoing by the debtor." 260 F.3d at 401. In the decision below, the Fifth Circuit concluded in dicta that "*Hickman*'s interpretation of § 523(a)(7) is consistent with the established definitions of that section's exclusive trio of fines, penalties, and forfeitures." Pet. App. 16. Because the Judgments are payable to and for the benefit of the State, the issue is whether the Judgments constitute a "fine, penalty, or forfeiture" within the meaning of section 523(a)(7).

The Fourth Circuit first addressed the issue of the dischargeability of bail-bond forfeiture obligations in *Collins*, holding that, in order to fall within the scope of section 523(a)(7), an obligation must be one that "is essentially penal in nature." 173 F.3d at 931 (describing section 523(a)(7) as "creat[ing] a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures") (quoting *Kelly*, 479 U.S. at 51). Interpreting *Kelly* to require that "a sanction must be penal to be exempt from discharge under § 523(a)(7)," the Fourth Circuit reasoned that a surety's obligation under a bail bond is not penal in nature, but rather is a contractual obligation, noting that the surety is not "punished" by the obligation because he committed "no penal or criminal act which gave rise to such debts." 173 F.3d

at 932 (internal quotation marks and citation omitted).

In *Hickman,* the Fifth Circuit found *Kelly* instructive, but not controlling, in the context of a surety's bail-bond obligation. 260 F.3d at 403. Applying the canon *noscitur a sociis*, the Fifth Circuit reasoned that "[t]he intended breadth of forfeiture within § 523(a)(7) must be interpreted . . . in light of its accompanying terms 'penalty' and 'fine.'" *Id.* (citation omitted). Noting that the definitions of "penalty" and "fine" reflect "the traditional understanding of these terms as punitive or penal sanctions imposed for some form of wrongdoing," the court concluded that "[t]heir inclusion in § 523(a)(7) implies that Congress intended to limit the section's application to forfeitures imposed upon a wrongdoing debtor." *Id.* at 404. The court next examined section 523(a) as a whole, noting that "the majority of [the listed exceptions to discharge] relate to a form of wrongdoing by the debtor." *Id.* (citing *In re Cross*, 666 F.2d 873, 880 (5th Cir. 1982) ("The exceptions to discharge found in [§ 523(a)] were designed to prevent the bankrupt from avoiding through bankruptcy the consequences of certain wrongful acts. . . .")).

Explaining that "exceptions to discharge are to be construed narrowly" in view of the primary purpose of bankruptcy law to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh," the court held that "forfeiture" in section 523(a)(7) applies "solely to forfeitures imposed because of misconduct or wrongdoing by the debtor." 260 F.3d at 404-05 (citing, *inter alia*,. S.

Rep. No. 95-989 at 79, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865 (section 523(a)(7) applies to tax assessments that are "penal in nature"); S. Rep. No. 95-989 at 97, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5883 (similar language in section 726(a)(4) concerns "punitive penalties")); *see also Gleason v. Thaw*, 236 U.S. 558, 562 (1915) ("In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed.").

Offering its analysis of *Hickman* in disagreement with Chief Judge Jones' concurrence urging *en banc* review, the majority below approved, explicitly in dicta, *Hickman*'s conclusion that section 523(a)(7) excepts from discharge "only those debts incurred as a result of misconduct or wrongdoing." Pet. App. 16. In so doing, the court explained that a pivotal distinction lies "between the absconding criminal defendants as principals [on bail bonds] and the bail bondsmen as sureties: The former would properly be denied discharge on their own cash or property bonds as 'forfeitures' in the § 523(a)(7) sense, but the latter are not forfeiting wrongdoers; they are ordinary judgment debtors who are not guilty of any wrongful conduct that should prohibit discharge in bankruptcy." *Id.* 19.

In this case, Soileau is not accused of any crime, but has merely defaulted on her civil obligation to produce absconding defendants in court or pay the bond. As a commercial surety, Soileau has no incentive to assist an absconding defendant, and there is no allegation that she did. To the contrary, she and

other commercial sureties have every incentive to ensure the presence of the defendant in court on pain of losing her wealth and, potentially, her license and livelihood.

In her concurrence below, Chief Judge Jones argued that *Hickman* "seriously misinterpreted Texas law when it held that bail bonds are essentially contractual, not penal, obligations." Pet. App. 25. But as explained above, *Hickman* interpreted Texas law properly; a surety's obligation under a bail bond is a contractual, civil obligation the breach of which does not give rise to criminal liability. *See Reyes*, 31 S.W.3d at 345-46. Like the State, Chief Judge Jones conflated the nature of the bail-bond *obligation* (contractual) with the type of *proceeding* in which these obligations are enforced (criminal). The Texas authorities cited in Chief Judge Jones' concurrence discuss the nature of a state court's *jurisdiction* over a bail-bond, not the nature of the obligation itself, and hold that "a *proceeding* for the forfeiture of bail bonds is 'a criminal case.'" Pet. App. 25-26 (citing *Jeter v. State*, 26 S.W. 49, 49 (Tex. 1894) ("a proceeding for the forfeiture of a bail bond is a criminal case") (discussing jurisdiction); *see also State ex rel. Vance v. Routt*, 571 S.W.2d 903, 906 (Tex. Crim. App. 1978) (same).

For purposes of section 523(a)(7), however, the issue is the nature of the obligation, not the nature of the jurisdiction of a particular court to enforce it. As noted, a bail-bond forfeiture is a unique form of civil debt – the *obligation* is civil and contractual, but the *proceeding* in which it is enforced is, by necessity,

criminal because the bond relates to a criminal defendant. *Reyes*, 31 S.W.3d at 345-46. Critically, there is no evidence that Congress intended this type of civil obligation to fall within the scope of section 523(a)(7). Indeed, the evidence is to the contrary.

Finally, the question whether section 523(a)(7) applies to bail-bond forfeiture judgments against commercial sureties, with minimal interpretation by the courts of appeals, is not a matter of extraordinary importance requiring this Court's intervention. Rather, it is an arcane question of bankruptcy law that arises rarely. Accordingly, certiorari is not warranted.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

Alva Wesley-Thomas
Attorney at Law
6161 Savoy, Suite 250
Houston, TX 77036
(713) 278-0800

G. Eric Brunstad, Jr.
Counsel of Record
Rheba Rutkowski
Collin O'Connor Udell
Sukti Dhital
Jeff Goldman
Laura K. Langley
Philip B. Janis
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

Counsel for Respondent

Dated: January 7, 2008

(3)

No. 07-482

FILED
JAN 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

81

In The Supreme Court of the United States

THE STATE OF TEXAS,

Petitioner,

v.

GERALDINE H. SOILEAU,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

CHARLES A. ROSENTHAL, JR.
Harris County District Attorney

JAMES L. NORRIS*
KATHLEEN A.B. BRADDOCK
Assistant District Attorneys
Harris County, Texas

1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5824
**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Central Virginia Community College v. Katz, 546 U.S. 356 (2006) 11

City of Philadelphia v. Gi Nam (In re Gi Nam), 273 F.3d 281 (3d Cir. 2001) 11

Dobrek v. Phelan, 419 F.3d 259 (3rd Cir. 2005) 8, 9, 11

General Bonding & Casualty Insurance Co. v. State, 73 Tex.Crim. 649, 165 S.W. 615 (1914) 1, 3, 6

Gibson v. State, 401 S.W.2d 822 (Tex.Crim.App. 1967) 7

Grogan v. Garner, 498 U.S. 279 (1991) 8

Hickman v. Texas, 260 F.3d 400 (5th Cir. 2001) 7, 9, 10, 11

Jeter v. State, 86 Tex. 555, 26 S.W. 49 (1894) 2

Keith v. State, 760 S.W.2d 746 (Tex.App. 1988), *aff'd*, 802 S.W.2d 690 (Tex.Crim.App. 1990) 3, 4

Kelly v. Robinson, 479 U.S. 36 (1986) 9, 12

Kubosh v. State, 177 S.W.3d 156 (Tex.App. – Houston [1st Dist.] 2005, pet. refused) 4, 5

Marshall v. State, 797 S.W.2d 698 (Tex.App. 1990) 3

Morin v. State, 770 S.W.2d 599 (Tex.App. 1989) 3

Reyes v. State, 31 S.W.3d 343 (Tex.App. 2000) 1, 3

Rodriguez v. State, 673 S.W.2d 635 (Tex.App. – San Antonio 1984, no writ) 5

TABLE OF AUTHORITIES – Continued

Page

State v. Sellers, 790 S.W.2d 316 (Tex.Crim.App. 1990) 1, 2, 3, 5, 6

Tennessee Student Assistant Corp. v. Hood, 541 U.S. 440 (2004) 6, 11

Virginia v. Collins (In re Collins), 172 F.3d 924 (4th Cir. 1999) 11

STATUTES

CIVIL PRACTICE AND REMEDIES CODE § 51.012 2

TEX.CODE CRIM.PROC.ANN. art. 17.29(a) 5

TEX.CODE CRIM.PROC.ANN. art. 22.10 2

11 U.S.C. § 523(a)(7) 8, 9, 10

REPLY BRIEF

Pursuant to Rule 15(5) and (6) of Supreme Court Rules, the State of Texas ("State") files this Reply Brief.

In Geraldine Soileau's ("Soileau") Brief in Opposition, page 12, she states, "At bottom, a bail-bond forfeiture obligation is a unique type of debt – the *obligation* is civil and contractual, but the *proceeding* in which it is enforced is criminal because the contract is related to a criminal defendant. *Reyes v. State*, 31 S.W.3d 343, 345 (Tex.App. 2000)." This statement is inaccurate and misleading. Soileau is citing to *Reyes*, an intermediate court of appeals decision out of Corpus Christi, which is not the law in Texas. (One might say that it could be the law in the Corpus Christi Court of Appeals jurisdiction if there was no authority to the contrary out of the Court of Criminal Appeals, but in this situation there is authority to the contrary out of the Court of Criminal Appeals). The highest Texas criminal court is the Court of Criminal Appeals. In 1914 the Court of Criminal Appeals in *General Bonding & Casualty Insurance Co. v. State*, 73 Tex.Crim. 649, 165 S.W. 615, 617 (1914) held that while a bond forfeiture action " . . . is not directly to punish the offender . . . it partakes of punishment for an offense against the state, and **is not in the nature of a violation of a contract**." (Emphasis added). Furthermore the Court of Criminal Appeals in *State v. Sellers*, 790 S.W.2d 316, 321 (Tex.Crim.App. 1990) stated,

> . . . **a bond forfeiture proceeding is not a "civil case,"** Article 22.10 supra, notwithstanding. The Supreme Court of Texas long ago noted, in responding negatively to the certified question whether courts of civil appeals had jurisdiction to entertain appeals in bond forfeiture proceedings, that "[t]he effect of this provision [a forerunner of Article 22.10] was to prescribe the manner of trial, **but did not change the character of the case**." *Jeter v. State*, 86 Tex. 555, 26 S.W. 49 (1894). The Supreme Court, the Court of Appeals, and its successor, this Court, have all consistently held that bond forfeiture is a criminal matter. (Citations omitted). Article 22.10, supra simply prescribes that civil rules shall govern all proceedings in the trial court following judgment nisi. **It does not transform a bond forfeiture proceeding from a criminal into "a civil case"** for purposes of § 51.012, supra. (Emphasis added).

The State in *Sellers* was attempting to appeal an adverse decision in a bond forfeiture case relying on TEX.CODE CRIM.PROC.ANN. art. 22.10, which provides that the proceedings in a bond forfeiture case shall be governed by the same rules governing civil suits. The State wanted to apply § 51.012 of the Civil Practice and Remedies Code, which provides that, "**In a civil case** in which the judgment or amount in controversy exceeds $100, exclusive of interest and costs, a person may take an appeal or writ or error to the court of appeals from a final judgment of the district or county court." (Emphasis added). The Court in *Sellers*

is very clear that a bond forfeiture proceeding is a criminal case and not a civil case; and as such, the State was not and is not entitled to appeal bond forfeiture cases.

Application of both *General Bonding & Casualty Insurance Co.* and *Sellers* results in the following correct statement in Texas: a bail bond forfeiture obligation is a unique type of debt – the obligation is criminal and is not in the nature of a violation of a contract and the civil rules govern all proceedings in the trial court following the judgment nisi. Soileau, throughout her brief, has confused and misstated the nature of bond forfeiture judgments in Texas. By misconstruing the nature of bond forfeiture judgments in Texas, Soileau is sending the Court down a wrong path. Again, Texas law holds that (1) a bond forfeiture obligation is criminal in nature, (2) a bond forfeiture obligation is **not** in the nature of a violation of contract (i.e., any written agreement remains between the surety and the principal, and not with the State) and (3) in a bond forfeiture case, civil rules govern all proceedings.

Soileau on page 12 of her Brief in Opposition states, "As Texas courts have recognized, a bail bond is a contract between the surety and the State." Soileau cites to *Reyes*, *Morin v. State*, 770 S.W.2d 599, 599 (Tex.App. 1989); *Keith v. State*, 760 S.W.2d 746, 747 (Tex.App. 1988), *aff'd*, 802 S.W.2d 690 (Tex.Crim.App. 1990) (bail bond 'is a contract between Keith, as a surety, and the State'); *Marshall v. State*, 797 S.W.2d 698, 702 (Tex.App. 1990). Critically

important here is that the statement in each of these cases that "a bail bond is a contract between the surety and the State" is dicta. The Court of Criminal Appeals in *Keith*, 802 S.W.2d at 691, states "Recently, we held that Art. 22.16(c)(2) violates the separation of powers provision in Art. II, § 1 of the Texas Constitution. (Citation omitted). Because we declared the contested portion of the statute unconstitutional, the question of whether it was to be applied prospectively or retroactively is now moot." The Court of Criminal Appeals states in footnote 1, at 690, that "We express no opinion on the Court of Appeals' holding that the State had secured vested rights in entering into the bail contract and that the amendment was substantive, not procedural." Accordingly, the Court of Criminal Appeals has **never** held that a bail bond is a contract between the surety and the State.

Since the Court of Criminal Appeals has never held that a bond is a contract between a surety and the State, it then becomes an issue as to which of the intermediate court of appeals' decisions applies to Soileau. Soileau was a Harris County surety and is a Harris County resident and Harris County is in the Court of Appeals for the First and Fourteenth Districts of Texas. Thus a decision out of the First District Court of Appeals is the law that is binding and would be applied to Soileau. The First District Court of Appeals in *Kubosh v. State*, 177 S.W.3d 156, 160 (Tex.App. – Houston [1st Dist.] 2005, pet. refused), at footnote 4 held, "We disagree with Kubosh's contention that the State is a party to the bail-bond contract."

The recent 2005 *Kubosh* court further states in footnote 4 that:

> The bond is "a written undertaking entered into by the defendant and his sureties . . . " Tex.Code Crim.Proc.Ann. art. 17.02 (Vernon 1977); *Rodriguez v. State*, 673 S.W.2d 635, 640 (Tex.App. – San Antonio 1984, no writ). The sureties agree to assume the bond obligation in return for consideration, usually a fee, paid by the principal. *Rodriguez*, 673 S.W.2d at 640. The State does not release the principal because of contractual consideration between the State and the surety, but because of constitutional and statutory rights of the principal. *Id.*; Tex. Const. Art. I, § 11; Tex.Code Crim.Proc.Ann. art. 1.07 (Vernon 1977).

See also TEX.CODE CRIM.PROC.ANN. art. 17.29(a) which provides, "When the accused has given the required bond, either to the magistrate or the officer having him in custody, he shall at once be set at liberty." In the final analysis, a bail bond is **not** a contract between the surety and the State. Rather, and as set forth above in *Kubosh*, a bail bond is "a written undertaking entered into by the defendant and his sureties."

On page 15 of Soileau's Brief in Opposition, she states that the nature of Soileau's obligation is plainly a civil obligation and that bond forfeiture proceedings being criminal refer to the general jurisdiction of the court that enforces it. Soileau is mistaken. The *Sellers* decision is **not** a decision

concerning "jurisdiction" as Soileau suggests. Rather it is a decision stating that the "character of a bond forfeiture case" is a criminal case and not a civil case. Soileau's statement on page 15 of her Brief in Opposition that, "Because the decisions that Texas cites characterize the jurisdiction of the enforcing court, rather than the nature of the obligation itself, these cases provide no real authority that Soileau's debt is criminal in nature," is simply wrong and is a misstatement of Texas law. As set forth above, both the *Sellers* decision and *General Bonding & Casualty Insurance Co.* make it clear that in Texas a bond forfeiture obligation is criminal in nature and is not in the nature of a violation of a contract. Accordingly, Soileau is incorrect in stating that the bond forfeiture obligation is a civil debt; and as such, Soileau is further mistaken in stating that it is qualitatively indistinguishable from the civil student-loan debt at issue in *Tennessee Student Assistant Corp. v. Hood*, 541 U.S. 440 (2004).

Soileau at pages 17 and 18 of her Brief in Opposition, sets forth that the State asserted that the discharge of bail-bond forfeiture judgments in bankruptcy would devastate its criminal justice system and that the State asserted that its criminal justice system faces ruin. Such statements are untrue and are a gross exaggeration by Soileau designed to prejudice the State's Petition for Certiorari. Such conduct by Soileau has no place in appellate advocacy. Rather the State asserted on page 14 of its Petition for a Writ of Certiorari, "Allowing the bankruptcy

court to discharge these bond forfeiture judgments interferes with the State's right to administer its criminal justice system." This position statement by the State clearly is **not** an assertion that discharges in bankruptcy would devastate its criminal justice system or that the State of Texas criminal justice system faces ruin.

It is evident from statements made by Soileau on pages 17 through 20 of her Brief in Opposition that she does not understand the nature of the criminal justice system in Texas. The court in *Hickman v. Texas*, 260 F.3d 400, 406 (5th Cir. 2001), distinctly acknowledges that, " . . . the bail bond is an integral and essential tool in the administration of the State's criminal justice system." The State's criminal justice system extends beyond the concept of financial responsibility to satisfy a bond forfeiture judgment that a surety owes when a principal fails to appear and the surety has a bond forfeiture judgment entered against her. The criminal justice system (1) extends to the requirement that the surety has a duty to return a principal to custody and (2) acts as a deterrent to other sureties to be responsible for the principals that they have bonded out. It is imperative for all sureties to understand that they cannot shed their duty and responsibilities by simply filing bankruptcy to avoid payment of the bond forfeiture judgments, since all sureties have a responsibility and duty to locate absent defendants and bring them back to custody in order to protect innocent victims of crime. In *Gibson v. State*, 401 S.W.2d 822, 825 (Tex.Crim.App.

1967) the court referenced the duties of a surety stating, "The realization that their bond will be forfeited in the event the principal fails to appear . . . should not lessen the ardor with which the surety pursues the principal who fails to appear for his trial." Likewise this criminal justice system concept is implied in *Dobrek v. Phelan*, 419 F.3d 259, 264-65 (3rd Cir. 2005) wherein the *Dobrek* court states that a surety has a duty to produce defendants in court and "should the bail bond debts of a commercial bondsman be dischargeable in bankruptcy, the state's criminal proceedings may effectively be invalidated, triggering comity and federalism concerns."

On page 20 of Soileau's Brief in Opposition, she references that "a primary purpose of bankruptcy law is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" (Citation omitted). This Court in *Grogan v. Garner,* 498 U.S. 279, 287 (1991) sets forth that 11 U.S.C. § 523(a) overrides the fresh start purpose of bankruptcy by stating, "Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories [encompassed by § 523(a)] **outweighed** the debtors' interest in a complete fresh start." (Emphasis added). Therefore by qualifying under § 523(a)(7) bond forfeiture judgments override the "fresh start" purpose of bankruptcy.

On page 23 of Soileau's Brief in Opposition she states that, "Texas suggests that the decision below is

contrary to *Kelly v. Robinson*, 479 U.S. 36 (1986). Pet. 12, 15." The State does not say that on either pages 12 or 15 of its Petition before this Court. Again, Soileau is in error. The State, however, agrees that the majority opinion in the Fifth Circuit Court case being appealed here does defend the *Hickman* decision. Further the State also agrees that *Hickman* misinterpreted *Kelly* to arrive at its decision to discharge bond forfeiture judgments in bankruptcy. The State's position in this regard mirrors the decision in *Dobrek*, 419 F.3d at 266-67, since Dobrek held that "forfeitures" are within the plain meaning of § 523(a)(7) and that its holding is consistent with *Kelly*. *Dobrek* goes on to state that *Hickman's* decision that § 523(a)(7) contemplated only those fines or obligations imposed because of misconduct or wrongdoing by the debtor was based on *Hickman's* misinterpretation of *Kelly*. *Dobrek* states that the Third Circuit has expressly rejected *Hickman's* interpretation of *Kelly*. The State believes that *Dobrek's* interpretation of *Kelly* is the correct interpretation and that bond forfeiture judgments are not dischargeable in bankruptcy.

On pages 25-29 of Soileau's Brief in Opposition, she states that the State has waived any argument concerning § 523(a)(7). The State disagrees. The State explained on page 7 of its Petition that it was prevented from directly challenging *Hickman* based on the rule in the Fifth Circuit Court that one panel of the Fifth Circuit cannot overrule a former panel decision of the Fifth Circuit. This ruling by the Fifth

Circuit is what necessitated the State's challenge on the grounds of sovereign immunity instead. The State, however, always contended that *Hickman* was wrongly decided and that § 523(a)(7) should include bond forfeiture judgments. Chief Judge Jones' concurring opinion, Pet. App. 24, states, "The State has **consistently argued**, however, and I agree that *Hickman* was wrongly decided." (Emphasis added). At oral arguments before the Fifth Circuit Court, there was substantial argument concerning whether *Hickman* was correctly decided. There is no question but that the State raised and argued before the Fifth Circuit Court the issue concerning whether *Hickman* was correctly decided. There also is no question but that the Fifth Circuit Court majority considered this issue and even states, Pet. App. 19, " . . . we agree with *Hickman's* interpretation of § 523(a)(7) as excepting from discharge only those debts incurred as a result of misconduct or wrongdoing."

While Soileau contends that the discussion by the majority concerning *Hickman* is dicta, this does not appear to be accurate. Noteworthy is that the Fifth Circuit Court decision consists of 29 pages in totality; and yet, over 17 pages of the Fifth Circuit's decision is spent discussing whether *Hickman* was correctly decided. Chief Judge Jones' concurring opinion states that *Hickman* was incorrectly decided and the majority considered it important to respond to the concurring opinion. The State submits that the substantial discussion by the majority along with the concurring opinion concerning *Hickman* is not just dicta. Rather

such substantial discussion by the Fifth Circuit resulted in the majority deciding that *Hickman* was correct and did not need to be reconsidered.

Accordingly, the State submits that certiorari review is proper to determine whether bond forfeiture judgments are dischargeable in bankruptcy court since there is a circuit court split on this issue. The Third Circuit Court decisions in both *Dobrek*, 419 F.3d 259 (3rd Cir. 2005) and *City of Philadelphia v. Gi Nam (In re Gi Nam)*, 273 F.3d 281 (3d Cir. 2001) hold that bond forfeiture judgments are not dischargeable in bankruptcy while the Fourth Circuit Court in *Virginia v. Collins (In re Collins)*, 172 F.3d 924 (4th Cir. 1999) and the Fifth Circuit Court in *Hickman v. Texas*, 260 F.3d 400 (5th Cir. 2001) hold that bond forfeiture judgments are dischargeable in bankruptcy. The State submits that the question as to whether bond forfeiture judgments are dischargeable in bankruptcy is an important federal question concerning all states. The State believes that this Court should resolve this conflict between the Circuit Courts of Appeals.

The State further believes that certiorari is proper to review the decision by the Fifth Circuit Court concerning the sovereign immunity issue. The State submits that the decisions in *Tennessee Student Assistant Corp. v. Hood*, 541 U.S. 440 (2004) and *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) provide authority which allows the State to prevail on its sovereign immunity issue since the bankruptcy court's *in rem* jurisdiction

offends traditional state sovereignty over the State's criminal justice system. As Chief Judge Jones stated in her concurring opinion, Pet. App. 23, footnote 48, "Thus, it could be argued that the mere fact that this case concerns an *in rem* proceeding in bankruptcy does not end this court's analysis if the bankruptcy court's exercise of *in rem* jurisdiction offends traditional state sovereignty over its criminal justice system." In addition, Chief Judge Jones stated, Pet. App. 28, "Informed by *Kelly*, I would hold that a bankruptcy court may not utilize its *in rem* jurisdiction to ride rough-shod over this traditional bastion of state sovereignty . . . " The State's position parallels the concurring opinion since bond forfeiture judgments in Texas are criminal in nature and the bankruptcy court's *in rem* jurisdiction discharging Soileau's bond forfeiture judgments offends the State's criminal justice system.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

CHARLES A. ROSENTHAL, JR.
Harris County District Attorney

JAMES L. NORRIS*
KATHLEEN A.B. BRADDOCK
Assistant District Attorneys
Harris County, Texas
1201 Franklin, Suite 600
Houston, Texas 77002
(713) 755-5824
**Counsel of Record*

Counsel for Petitioner